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**The role of International Labor Organization Convention 189 in strengthening
Cambodia's negotiating position with Malaysia when finalizing the Memorandum of
Understanding concerning the protection of Cambodian migrant domestic workers**

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Abstract

This paper considers human rights protections afforded to Cambodian domestic workers both within Cambodia and in other countries, particularly Malaysia. The paper argues that existing Cambodian Labor Law offers inadequate protection to domestic workers, and needs to be amended in order for Cambodia to better respect the rights of such workers.

The paper assesses whether the International Labor Organization (ILO) Convention concerning Decent Work for Domestic Workers is an appropriate starting point from which the necessary amendments may be made. The paper concludes that the ILO Convention provides an effective framework for Cambodia to improve its laws and policies, in particular the Labor Law.

Finally, the paper argues that should Cambodia ratify this ILO Convention, Cambodia can not only protect the rights of domestic workers in Cambodia, but such an action will also act to strengthen Cambodia's negotiating position when attempting to protect the human rights of Cambodian domestic workers in Malaysia and thereafter in other countries.

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Introduction

This study is inspired by stories of Cambodian domestic workers¹ living in Malaysia who experienced serious violations of their rights ranging from physical and psychological violence and exploitation.² The Cambodian government decided in October 2011 to ban domestic workers travelling to Malaysia.³ The Cambodian and Malaysian governments are now negotiating an end to the ban and are working on a “Memorandum of Understanding between the Government of Malaysia and the Government of Kingdom of Cambodia on the Recruitment and Placement of Cambodian Domestic Workers” (MoU), to govern Cambodian domestic workers undertaking work in Malaysia.⁴

The struggle for protection of the rights of Cambodian domestic workers to be recognized has been challenging. Malaysia initially strongly objected to a proposal to include in the MoU a clause stating that employers⁵ should respect the basic rights of domestic workers, among others.⁶ Fortunately, the latest draft of the MoU affords domestic workers some protections, in that it provides domestic workers with training prior to going to Malaysia, protection of salary, and medical cover.⁷ Nevertheless, this latest draft appears to still leave significant opportunities for violations of rights to occur.⁸ As at April 2015, the Cambodian government has signed this latest draft of the MoU but the Malaysian government has not.⁹

This paper argues that Cambodia is not in a strong position to negotiate the rights of its domestic workers in Malaysia, given the position of domestic workers in Cambodia itself. In doing this, the abuses suffered by Cambodian domestic workers in Malaysia are used as a starting point only. The paper examines how the Labor Law of the Kingdom of Cambodia (Labor Law) would apply if these potential abuses were to happen in Cambodia. The paper finds that the Labor Law does not adequately address human rights violations, nor does it provide adequate remedies for domestic workers suffering from violations. This indicates that Cambodia’s national human rights record appears likely to be exploited by Malaysia during negotiations for the MoU, thereby limiting the Cambodian government’s power to argue for the inclusion of protective terms and conditions for Cambodians travelling to take up domestic worker positions in Malaysia.

This paper also argues that if Cambodia strengthens its domestic laws and policies to better protect Cambodian domestic workers in Cambodia, it would be in a stronger position to negotiate the MoU with Malaysia and, by implication, with other countries.¹⁰ In support of this argument, the paper analyzes the 2011 International Labor Organization (ILO)

¹ The term “domestic worker” in this paper refers to a housekeeper.

² Human Rights Watch, “*They Deceived Us at Every Step*” Abuse of Cambodian Domestic Workers Migrating to Malaysia, United States of America: Human Rights Watch, November 2011, p. 56.

³ Human Rights Watch, “Cambodia: Overhaul Protections for Migrant Domestic Workers”, *Human Rights Watch*, October 14, 2011, accessed September 14, 2014, <http://www.hrw.org/news/2011/10/14/cambodia-overhaul-protections-migrant-domestic-workers>.

⁴ See Memorandum of Understanding between the Government of Malaysia and the Government of Kingdom of Cambodia on the Recruitment and Placement of Cambodian Domestic Workers (Draft), November 2014.

⁵ The “employer” may refer to “member of the household...or an agency or enterprise” that hires domestic workers to work in households.

See ILO, Decent Work for Domestic Workers: Convention 189 & Recommendation 201 at a glance, ILO, 2011, p. 8.

This paper, however, uses the word “employer” to refer to house-owner, and “agency” to refer to an enterprise, which provides housemaids to employer who is a house-owner.

⁶ Matt Blomberg and Sovuthy Khy, “Malaysia Fails to Guarantee Cambodian Maids’ Human Rights”, *The Cambodia Daily*, December 24, 2013, accessed April 28, 2015, <https://www.cambodiadaily.com/archives/malaysia-fails-to-guarantee-cambodian-maids-human-rights-49629/>.

⁷ Simon Henderson, “Government Approves Pact to Send Maids to Malaysia”, *The Cambodia Daily*, March 18, 2015, accessed March 19, 2015, <https://www.cambodiadaily.com/news/government-approves-pact-to-send-maids-to-malaysia-79972/>.

⁸ See Memorandum of Understanding between the Government of Malaysia and the Government of Kingdom of Cambodia on the Recruitment and Placement of Cambodian Domestic Workers, *supra* note 4.

⁹ Henderson, “Government Approves Pact to Send Maids to Malaysia”, *supra* note 7.

¹⁰ This view is not isolated. According to Mr. Ya Navuth, who is an executive director of the Coordination of Action Research on AIDS and Mobility (CARAM) Cambodia, Cambodia should be a “role model...we want to set conditions only when Cambodia [also] protects the housemaids in Cambodia”. Navuth Ya, telephone interview with author, on file with author, September 1, 2014.

Convention concerning Decent Work for Domestic Workers (C189) to determine the extent to which this Convention addresses various situations experienced by domestic workers in Cambodia.

The paper concludes that C189 offers an effective framework for improving national laws and policies to protect domestic workers. Thus, Cambodia should ratify and implement C189, despite any challenges it may encounter by doing this. In making this argument, the paper hopes to encourage a more sophisticated public debate regarding regulating the rights of domestic workers in Cambodian domestic laws and policies, as well as foster constructive debate regarding the ratification of C189.

The paper consists of three parts. Part 1 identifies the main human rights abuses claimed by Cambodian domestic workers in Malaysia, in light of international human rights standards. It does this through a review of a case study and relevant reports. Part 2 examines the legal position when similar violations occur in Cambodia, and considers whether the Labor Law sufficiently addresses these abuses. Finally, Part 3 discusses the possible role of C189 in rectifying the problems faced by domestic workers and outlines challenges in ratifying and implementing C189 in Cambodia.

Part 1: Main human rights abuses on Cambodian domestic workers in Malaysia

The ban imposed by the Cambodian government on domestic workers travelling to Malaysia is both a curse and a blessing. Article 36(1) of the Constitution of the Kingdom of Cambodia (Constitution) provides that its citizens shall enjoy the “right to choose any employment”.¹¹ Moreover, they shall enjoy the right to travel outside Cambodia.¹² Thus, the ban could be disappointing for many domestic workers who wish to exercise their rights, as guaranteed under the Constitution, by choosing to work as domestic workers in Malaysia, in order to earn a decent salary.¹³

On the other hand, the ban is a blessing, in that it acts to prevent more Cambodian domestic workers from travelling to Malaysia to work, thereby preventing them from having their human rights violated in that country. Some Cambodian domestic workers¹⁴ in Malaysia suffer a range of human rights abuses, including food deprivation, excessive work demands, withheld salaries, physical violence, psychological abuse, physical confinement, and restrictions on their freedom of movement through passport confiscation.¹⁵ As Mr. Ya Navuth, whose work involves rescuing Cambodian domestic workers from Malaysia, asserts, “as long as there is no MoU or bilateral agreement which has a lot of protections for migrant workers, Cambodia should not send housemaids to work in Malaysia”.¹⁶ The ban cannot, however, prevent such abuses occurring to those Cambodian domestic workers already in Malaysia.

The experience of a female domestic worker, Neary,¹⁷ clearly demonstrates these. Despite the moratorium, Neary travelled from Cambodia to Malaysia, assisted by a broker. The broker had promised Neary that she would earn US\$200 a month as a domestic worker

¹¹ Constitution of the Kingdom of Cambodia, 1993.

¹² *Ibid.* Art. 40.

¹³ According to the Community Legal Education Center, “poor wages and inadequate economic opportunities” in Cambodia contribute to people leaving the country for work. See Brandais York, *The Risk of Movement: Migration in Cambodia 2013*, Phnom Penh: Community Legal Education Center, 2014, pp. 14-15, 24.

¹⁴ This paper does not generalize that all or most domestic workers have negative experiences in Malaysia. See Human Rights Watch, “*They Deceived Us at Every Step*” *Abuse of Cambodian Domestic Workers Migrating to Malaysia*, *supra* note 2, p. 56.

¹⁵ Neary, interview with author, on file with author, March 22, 2014; See Asha D’Souza, *Moving towards Decent Work for Domestic Workers: An Overview of the ILO’s Work*, ILO, 2010, pp. 19-26; See Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action*, Switzerland: Sro-Kundig, October 2005, pp. 61-62.

¹⁶ Navuth Ya, telephone interview with author, *supra* note 10.

¹⁷ The name has been changed in order to protect privacy.

and would be able to live with her aunt, who already lived in Malaysia. The reality was much different, however. Neary never lived with her aunt and returned to Cambodia after three months, having suffered a range of abuses of her human rights.¹⁸

One such right was Neary's right to adequate food. According to paragraph 8 of the General Comment No. 12 of the Committee on Economic, Social and Cultural Rights (CESCR) on the Right to Adequate Food (Art.11), the right to food refers to the "availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals...[and] accessibility of such food".¹⁹ However, during her stay in Malaysia, the agency which the broker sent Neary to, generally provided Neary with one small meal a day; this malnutrition made her sick and caused her significant weight loss. Furthermore, Neary was under the almost total control of her employer and agency, to the extent that she was not allowed to leave her employer's house or the agency, nor did she receive any salary.²⁰ This clearly means that she did not have the means to access food or any way in which to procure it for herself. Consequently, her right to food was blatantly violated.

In addition, Neary did not enjoy many key aspects of the right to work. Article 7 of International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that the right to work includes just and favorable working conditions. To ensure this right, workers must receive, among other things, fair remuneration for their appropriate number of working hours. They must also enjoy not only safe, but healthy working conditions.²¹ In contrast, in her employer's house, she fell sick on her second day of work due to lack of sleep and overwork. Inside the agency itself, Neary, together with others, was made to clean the three-floor house, and sometimes perform tasks that were either unnecessary or had already been done. She was also required to learn the English words for household goods. As a result, Neary worked for approximately 17 hours a day with no rest day. Despite this demanding job, Neary did not receive any wages.²²

Moreover, agency workers used physical and psychological violence against domestic workers. In the case of Neary, the agency staff locked Neary for days inside a room on multiple occasions. This included when she wanted to meet her aunt and even when serious illness prevented her from working. Further, the agency withheld Neary's passport.²³ If Malaysian authorities had found Neary with no passport, she would have been deemed to be in breach of her visa obligations and at risk of deportation.

In short, Neary suffered from forced labor exploitation. Potentially, her situation also amounted to "modern" slavery.²⁴ Forced labor refers to any work performed involuntarily by any person "under the menace of any penalty",²⁵ while Anti-Slavery International describes "modern" slavery as comprising four elements. Those elements are that a person is: (a) "forced to work" through threat; (b) "owned or controlled by an 'employer'"; (c) "dehumanized, treated as a commodity"; and (d) "physically constrained" or restricted on freedom of movement.²⁶ Neary's situation could clearly be classified as a form of "modern" slavery because she was made to work through threat, her working conditions were dehumanizing, and she was not allowed to leave that abusive situation.

It is acknowledged that the Malaysian government did not directly cause the violations outlined above; rather, they were the result of the actions of the Malaysian-based

¹⁸ Neary, interview with author, *supra* note 15.

¹⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11), May 12, 1999.

²⁰ Neary, interview with author, *supra* note 15.

²¹ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 993 U.N.T.S. 3.

²² Neary, interview with author, *supra* note 15.

²³ *Ibid.*

²⁴ See UN General Assembly, International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171, Art. 8.

²⁵ Convention concerning Forced or Compulsory Labour (No. 29), May 1, 1932, 39 U.N.T.S. 55, Art. 2.

²⁶ Anti-Slavery International, "What is modern slavery", accessed May 26, 2015, http://www.antislavery.org/english/slavery_today/what_is_modern_slavery_2.aspx.

employer and agency. Nevertheless, this paper argues that Malaysian law should require employers and agencies to meet the threshold of human rights standards and ensure that domestic workers benefit from this higher standard.

Neary's experience demonstrates that Cambodian domestic workers in Malaysia can suffer from violations of many human rights, including the right to food, various workers' rights and the right to be free from forced labor and "modern" slavery. Thus, the fact that such breaches are allowed to occur means that it may be concluded that Malaysian law, or its application, is inadequate when it comes to protecting human rights of domestic workers.

Part 2: Cambodian Labor Law on protection of domestic workers

This paper argues that for Cambodia to strengthen its position to conclude an MoU on Cambodian domestic workers, with Malaysia that is based on international human rights standards, it needs to adequately protect its own national domestic workers in Cambodia. This section examines the Labor Law to consider which provisions and remedies are available to domestic workers should the same abuses identified in Part 1 happen in Cambodia. Following this, the paper concludes that domestic work in Cambodia falls within the ILO's finding that domestic work generally is "undervalued and poorly regulated".²⁷

The Labor Law defines domestic workers as those who "take care of the home owner or of the owner's property in return for remuneration".²⁸ Aside from a few provisions, the Labor Law generally excludes domestic workers from its application. Article 1(4)(e) clearly provides that the Labor Law does not apply to "domestics [sic] or household servants, unless otherwise expressly specified under this law".²⁹ This effectively precludes domestic workers from being afforded many protections, including those regarding minimum wages.

In respect of wages, articles 104³⁰ and 130 are the key provisions. Article 104 stipulates that a worker's wage must be at least of an equal amount to the minimum wage, in order to ensure "every worker" of a decent living standard.³¹ Article 104 mentions "every worker" which implies that every worker is entitled to the minimum wage. However, the effect of Article 1 is that unless an article is expressly said to apply to domestic workers, the article does not apply to such workers. As Article 104 does not expressly mention domestic workers, domestic workers do not appear to be entitled to the minimum wage and so do not enjoy a decent living. And even if Article 104 did apply to domestic workers, its practical effect may be limited because there is no minimum wage set for such workers at present.³²

Article 130, which does apply to domestic workers, offers some protection to such workers. It provides that "the portion of wage that is less than or equal to the guaranteed minimum wage cannot be garnished or assigned".³³ Thus, domestic workers may earn less than a minimum wage; if so, their wage can neither be garnished nor assigned. Even if domestic workers earn more than a minimum wage, that portion of their wage falling below the minimum wage cannot be garnished or assigned, thereby continuing to guarantee domestic workers a minimum wage that is not subject to being reduced through measures such as garnishing. However, without a stated minimum wage for domestic workers, whether this is of any practical benefit to such workers is questionable. Looking back at Neary's

²⁷ ILO, *Decent Work for Domestic Workers*, Report IV(1), International Labour Conference, 99th Session, Geneva: ILO, 2010, p. 5.

²⁸ Ministry of Social Affairs, Labor and Veteran Affairs, *Labor Law of the Kingdom of Cambodia*, 1997, Art. 4.

²⁹ Ibid.

³⁰ Art. 104 of the Labor Law provides, "the wage must be at least equal to the guaranteed minimum wage; this is, it must ensure every worker of a decent standard of living compatible with human dignity". Ibid.

³¹ Ibid.

³² Pengly Horng, "Domestic workers seek to tidy up industry", *The Phnom Penh Post*, September 13, 2014, accessed September 13 2014, <http://www.phnompenhpost.com/post-weekend/domestic-workers-seek-tidy-industry>.

³³ Ministry of Social Affairs, Labor and Veteran Affairs, *Labor Law of the Kingdom of Cambodia*, *supra* note 28, Art. 130(1).

example, it is unclear whether her salary was “garnished” or “assigned”, because she never received her salary at all.³⁴

The Labor Law explicitly protects domestic workers from forced labor. Article 15 strongly forbids forced labor in relation to any worker, including domestic workers.³⁵ According to the Labor Law, those who commit forced labor will be fined an amount calculated by 61 to 90 days of base daily wage or an imprisonment from six days to a month.³⁶ Therefore, if Neary could prove a claim of forced labor, a possible remedy would be available under the Labor Law.

Many domestic workers live inside their employers’ houses and rely on employers to provide them food. The right to food is “indivisibly linked” to the dignity of every person and it acts as a foundation from which one can enjoy other rights.³⁷ This requires states to act to ensure that individuals or enterprises do not deny anyone from accessing adequate food.³⁸ However, the Labor Law contains no provision that reflects the reality of domestic workers’ reliance on their employers for adequate food. This paper considers that separate guidance should be adopted to explicitly extend this right to food to domestic workers.

Even if their rights are violated, domestic workers will find it extremely difficult to find a complaint mechanism in Cambodia. Article 36(5) of the Constitution provides that Khmer citizens shall have the “right to create trade unions and to participate as their members”.³⁹ Article 1(4)(e) of the Labor Law echoes the Constitution by providing that “domestic or household servants are entitled to apply the provisions on freedom of union”.⁴⁰ The freedom of union provision enables the formation of unions; thus the Labor Law clearly protects domestic workers’ rights to form unions.

However, while the Labor Law offers this protection to domestic workers, circumstances dictate that it has not been practicable for such workers to form a trade union at present. Instead, they created the Cambodia Domestic Worker Network (CDWN), aiming to protect their rights and freedom.⁴¹ The role of CDWN in dispute resolution is, however, limited. When a violation occurs in relation to a domestic worker who is a member of CDWN, CDWN visits the employer’s house to offer to conciliate the dispute between the employer and that domestic worker. If the dispute is not resolved, the CDWN refers the case to the court. For non-CDWN members, however, CDWN only produces a report condemning violations which have occurred.⁴²

In contrast, for many other types of workers, when their collective rights - including working conditions - are suspected of being violated, they have access to a Labor Inspector.⁴³ In addition, they have the option of going to the Arbitration Council or/and going to court.⁴⁴

In short, domestic work receives almost no protection compared to other types of work under the present Labor Law. It is clear that the Labor Law does not adequately protect domestic workers against the various violations of human rights that occurred in Neary’s case, reinforcing the urgent need for Cambodia to amend its domestic laws to ensure adequate protection of its citizens’ human rights.

³⁴ Neary, interview with author, *supra* note 15.

³⁵ Ministry of Social Affairs, Labor and Veteran Affairs, *Labor Law of the Kingdom of Cambodia*, *supra* note 28.

³⁶ *Ibid.*, Art. 369.

³⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11), *supra* note 19, ¶ 4.

³⁸ *Ibid.*, ¶ 15.

³⁹ Constitution of the Kingdom of Cambodia, *supra* note 11.

⁴⁰ Ministry of Social Affairs, Labor and Veteran Affairs, *Labor Law of the Kingdom of Cambodia*, *supra* note 28.

⁴¹ For further information on the Cambodia Domestic Worker Network, See <http://www.dwscambodia.blogspot.hk>.

⁴² Samphors Von, interview with author, on file with author, August 30, 2014.

⁴³ Ministry of Social Affairs, Labor and Veteran Affairs, *Labor Law of the Kingdom of Cambodia*, *supra* note 28, Arts. 302-303.

⁴⁴ *Ibid.*, Arts. 310, 385, 389.

Part 3: ILO Convention 189 on protection of Cambodian domestic workers

According to the 2014 International Trade Union Confederation (ITUC) Global Rights Index, Cambodia is one of the “worst countries in the world for workers to work in” in terms of failing to guarantee workers’ rights.⁴⁵ As Part 2 demonstrates, the Labor Law poorly protects Cambodian domestic workers in Cambodia. Consequently, Cambodia is in a weak position to negotiate rights for Cambodian domestic workers in Malaysia. Thus, this paper supports the UN Committee on the Elimination of Discrimination Against Women’s recommendation that the Cambodian government “consider[s]” ratifying C189⁴⁶ and then gives effect to C189 in order to protect domestic workers in Cambodia. By taking these measures, Cambodia may be in a stronger position to persuade other countries to protect the rights of Cambodian domestic workers.

The subsection below analyzes the potential impact of C189 in addressing the rights mentioned in Part 1 and 2, and identifies some challenges to ratifying and implementing C189 in Cambodia.

Part 3.1: ILO Convention 189 on addressing various rights of domestic workers

Cambodia’s support for human rights treaties has been far from consistent. It has ratified the eight fundamental ILO conventions on freedom of association, forced labor, discrimination, and child labor,⁴⁷ which also cover domestic workers.⁴⁸ Further, the Constitution states that Cambodia “recognizes and respects” treaties concerning human rights and women’s rights.⁴⁹ However, in regards to domestic work, where women make up a majority of the workforce,⁵⁰ Cambodia has not ratified C189.⁵¹

Should Cambodia ratify C189, many of its provisions would have the capacity to protect the rights of domestic workers in Cambodia against violations of the rights outlined in Part 1 and 2. Article 6 of C189 stipulates that domestic workers must enjoy “fair terms of employment as well as decent working conditions”, and possibly decent living conditions should these workers live in their employers’ houses.⁵² To achieve this, domestic workers need to be informed of their working terms and conditions in an “appropriate, verifiable and easily understandable manner”.⁵³ In addition, Article 10 specifies that domestic workers are entitled to the same treatment as other types of workers, including in respect of working hours, weekly rest and annual leave.⁵⁴ Article 13 provides that domestic workers have the “right to a safe and healthy working environment”.⁵⁵ Applying these articles means that Neary should have been aware of her contract of employment, working hours, food allowance and remuneration, among other things, prior to commencing work. In any event, she would have had a record of her roles, responsibilities and benefits.

⁴⁵ Cambodia and Malaysia were rated “5”. Rate 1 – collective rights are “generally guaranteed”. Rate 2 – there are repetitions of rights violations. Rate 3 – there are regular rights violations. Rate 4 – there are systematic rights violations. Rate 5 – there is no guarantee of rights. Rate 5+ – there is no guarantee of rights due to the collapse of the rule of law. International Trade Union Confederation, *ITUC Global Rights Index: The World’s Worst Countries for Workers*, 2014, pp. 15, 18, 38.

⁴⁶ UN Committee on the Elimination of Discrimination Against Women (CEDAW), Concluding Observations on the Combined 4th and 5th Periodic Reports of Cambodia, October 29, 2013, ¶¶ 34-35.

⁴⁷ See ILO, “Ratifications of Fundamental Conventions and Protocols by Country”, accessed May 29, 2015, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0::NO:10011:P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F.

⁴⁸ ILO, Convention concerning Decent Work for Domestic Workers (No. 189), June 16, 2011, Preamble.

⁴⁹ *Constitution of the Kingdom of Cambodia*, *supra* note 11, Art. 31.

⁵⁰ ILO, Convention concerning Decent Work for Domestic Workers (No. 189), *supra* note 48, Preamble.

⁵¹ See ILO, “Countries That Have Not Ratified Convention 189”, accessed May 26, 2015, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO::P11310_INSTRUMENT_ID:2551460.

⁵² ILO, Convention concerning Decent Work for Domestic Workers (No. 189), *supra* note 48.

⁵³ *Ibid.*, Art. 7.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

Moreover, C189 addresses more than just working conditions. It calls on state parties to provide social security protection, covering protections such as maternity benefits to domestic workers, in consultation with relevant stakeholders, including the “most representative organizations of employers and workers”.⁵⁶ This is a particularly important issue for domestic workers as, since most domestic workers are women, protections for maternity benefits need to be appropriately available. In addition, domestic workers are currently excluded from the general insurance system for those who have work-related injuries, which is managed by the National Social Security Fund.⁵⁷

If Cambodia ratifies and implements C189, and then includes domestic workers in the Social Security Fund, the current Prakas (sub-decree) on Establishment of Health Insurance Scheme for Persons Defined by the Provisions of the Labor Law, will need to be amended because the health insurance scheme currently only applies to any enterprise or establishment having eight or more staff.⁵⁸ Yet many households have fewer than eight domestic workers, meaning that these domestic workers fall outside the scope of the Prakas. There is no reason, however, why these workers should not also be protected by the Social Security Fund.

Other relevant articles of C189 are Articles 16 and 17; these call for a dispute settlement mechanism and complaint mechanism respectively.⁵⁹ As discussed in Part 2, the existing Arbitration Council does not cover domestic workers.⁶⁰ Thus, the Arbitration Council’s mandate either needs to be broadened, or a special mechanism, in addition to court, needs to be created to deal with disputes and redress complaints that frequently involve domestic workers. These examples clearly demonstrate that Cambodian laws do not currently meet the standard required for compliance with C189.

Part 3.2: Challenges in ratifying ILO Convention 189

Domestic workers “make up a large portion of the workforce, especially in developing countries”.⁶¹ In the case of Cambodia, it is estimated that by ending the moratorium and once again enabling domestic workers to go to Malaysia alone, the Cambodian economy could generate approximately US\$120 million yearly.⁶² While there are obvious potential financial benefits stemming from domestic work, there is also a great need to regulate and protect domestic workers inside and outside Cambodia. In arguing for the introduction of protections for domestic workers into Cambodian national laws and policies, the paper foresees a few practical, but manageable, challenges.

There is pressure on the Cambodian government to urgently amend the existing Labor Law prior to ratifying C189. At the same time, Cambodia has a principle of supporting direct application for human rights treaties,⁶³ so the government may also ratify C189 prior to amending the national law. According to the Constitutional Council of Cambodia, judicial officers must consider international treaties ratified by Cambodia when deciding a case.⁶⁴ Thus, if ratified, C189 will apply irrespective of whether the Labor Law is amended.

⁵⁶ Ibid., Art. 14.

⁵⁷ Ministry of Social Affairs, Labor and Veteran Affairs, *Labor Law of the Kingdom of Cambodia*, *supra* note 28, Art. 256. (Employers are liable for work-related accidents occurring to domestic workers. Ibid., Arts. 248-249).

⁵⁸ Ministry of Labor and Vocational Training, *Prakas on Establishment of Health Insurance Scheme for Persons Defined by the Provisions of the Labour Law*, 2014, Art. 3.

⁵⁹ ILO, Convention concerning Decent Work for Domestic Workers (No. 189), *supra* note 48.

⁶⁰ For further information on the Arbitration Council, See <http://www.arbitrationcouncil.org>.

⁶¹ ILO, *Decent Work for Domestic Workers*, *supra* note 27, p. 1.

⁶² Henderson, “Government Approves Pact to Send Maids to Malaysia”, *supra* note 7.

⁶³ Bora Meas, “International Human Rights Law in Cambodia”, in *Cambodian Yearbook of Comparative Legal Studies*, vol. 1 (IL Virtue Unions, 2010), pp. 135–138.

⁶⁴ Case No. 131/003/2007 and Case’s decision No. 092/003/2007 CC.D, (Cambodian Constitutional Council, July 10, 2007), accessed May 27, 2015, <http://www.ccc.gov.kh/english/decision/2007/dec%2092.pdf>.

Nevertheless, even if Cambodia ratifies C189 prior to amending the law, it should implement C189 and amend the Labor Law soon after ratification, to reflect the rights of domestic workers.

A further challenge associated with ratifying C189 relates to entrenched social attitudes. Female domestic workers are mistakenly associated with “gender discrimination”, “poor economic value”, low social class and innate ability to perform domestic work.⁶⁵ Moreover, “non-recognition of domestic work as work”, the “hidden nature of workplace”, the “informality of the employment relationship” between the worker and the employer would continue to breed “exploitation and abuse”.⁶⁶ This indicates an urgent need to remove prejudices against domestic workers. The complete removal will take time, but this should not prevent the Cambodian government from ratifying C189 to protect domestic workers.

Another challenge is that the government must ensure it educates the employers and workers on Labor Law in order to respect the rights of domestic workers, including through education and media. This action will be costly, nevertheless in ratifying human rights treaties, the Cambodian government must not just respect and protect the rights embodied in such treaties, but also fulfill its treaty obligations by progressively raising awareness of these rights.

In short, the benefits of ratification appear to much outweigh the challenges regarding protecting the rights of domestic workers. Therefore, Cambodia should consider ratifying and giving effect to C189 to better protect domestic workers in Cambodia. After that, Cambodia would naturally be in a stronger position to take a more effective stance in demanding that the rights of Cambodian domestic workers be recognized by Malaysia and other countries, using its own record of offering protection to domestic workers as an example to follow.

Conclusion

Work undertaken by domestic workers may benefit the Cambodian economy, thereby assisting to reduce poverty in the country. However, irrespective of whether this is the case, Cambodia is legally and morally obliged to protect the rights of its domestic workers both within and outside the country.

As set out earlier in this paper, Cambodian domestic workers face a plethora of human rights abuses in Malaysia. These abuses could arguably constitute violations of the right to food, many aspects of the workers’ rights, forced labor and even “modern” slavery. Following repeated reports of such abuses, in 2011 the Cambodian government banned domestic workers from going to Malaysia, in an attempt to prevent more domestic workers from experiencing similar violations. At the same time, however, this ban negatively affects the earning capacity of Cambodians intending to engage in domestic work in Malaysia. Given this, a mechanism needs to be adopted that protects Cambodian domestic workers in Malaysia. Once this occurs, the ban may be lifted.

For many years now, Cambodia and Malaysia have been engaging in the process of drafting an MoU to govern Cambodian domestic workers taking up work in Malaysia. On a positive note, the latest draft of the MoU appears to offer noticeable protections to domestic workers. Yet, obvious gaps remain. While this is the case, violations of the rights of domestic workers in Malaysia will continue to be possible.

While the Cambodian government advocates for the protection of the human rights of Cambodian domestic workers in Malaysia, it fails to provide sufficient protections to the same workers within Cambodia. As this paper has identified, domestic workers are largely

⁶⁵ D’Souza, *Moving towards Decent Work for Domestic Workers: An Overview of the ILO’s Work*, supra note 15, pp. 1, 26-28.

⁶⁶ *Ibid.*, p. 1.

excluded from the operation of Labor Law, and are therefore denied the benefit of its protections, despite the fact that most domestic workers are women and the rights of women are expressly recognized under the Constitution. For example, the provision on the minimum wage does not expressly include domestic workers. In addition, the Labor Inspector and Arbitration Council generally do not oversee disputes between domestic workers and their employers. Moreover, domestic workers have not formed a union at present; the absence of this may limit their power in demanding protection of their rights. In short, the Labor Law itself does not provide sufficient legal protection for domestic workers in Cambodia.

Clearly, in order to strengthen its negotiating position, Cambodia must improve its own human rights record and become a better role model in terms of protecting rights of domestic workers. C189 provides an effective framework for Cambodian laws and policies to protect domestic workers. This Convention protects various human rights of domestic workers, including their right to a minimum wage and to enjoy a safe and healthy working environment, among others. For this reason, Cambodia should ratify C189 and implement it in its domestic laws and policies, despite the fact that this may require the Labor Law to be amended. It may also require the government to educate the public about the rights of domestic workers, which will cost time and financial resources. These hurdles should not, however, be used by the government as an excuse to avoid fulfilling its human rights obligations.

In short, this paper considers that there should be a public debate on regulating the rights of domestic workers with the view to implementing C189. Ratifying and implementing C189 would undoubtedly be a crucial step forward in enabling Cambodia to better protect the rights of domestic workers in Cambodia. While such a step may not occur before Cambodia and Malaysia finalize the MoU, it would without question strengthen Cambodia's position when negotiating any future MoUs which concern the protection of the rights of Cambodian domestic workers overseas.

Having an MoU which guarantees protections based on international human rights standards coupled with lifting the ban on travel to Malaysia will help to protect the fundamental human rights of domestic workers like Neary who chose to work abroad to better their lives financially. In Neary's words:

"I want to go back to Malaysia again because if we [Cambodians] go, and they protect us well and allow us to work normally and provide us enough food, then I want to always work there".⁶⁷

⁶⁷ Neary, interview with author, *supra* note 15.

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