

# FAIR RECRUITMENT OF MIGRANT WORKERS IN SRI LANKA

A Legal Gap Analysis



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This study was produced by the Legal Research Team at Verité Research. The legal team from Verité Research comprised Harindi Palkumbura, Nazrin Jhan with overall supervision by Nishana Weerasooriya. The team wishes to thank several others who guided, shared their feedback, and helped with other aspects of the research. The team is especially indebted to Nishan De Mel (Executive director) and Dinushika Dissanayake for their valuable feedback and support during the study. A special thanks goes to all who contributed to the interviews and discussions.

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# Table of Abbreviations

<b>Abbreviation</b>	<b>Definition</b>
<b>ALFEA</b> .....	Association of Licensed Employment Agencies
<b>ASEAN</b> .....	Association of Southeast Asian Nations
<b>C29</b> .....	Forced Labour Convention, 1930 (No.29)
<b>C097</b> .....	Migration for Employment Convention (Revised), 1949 (No.97)
<b>C143</b> .....	Migrant Workers (Supplementary Provisions) Convention, 1975 (No.143)
<b>C181</b> .....	Private Employment Agencies Convention, 1997 (No.181)
<b>CEDAW</b> .....	Committee on the Elimination of All Forms of Discrimination against Women
<b>CID</b> .....	Criminal Investigation Department
<b>CMW</b> .....	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
<b>CoD</b> .....	Country of Destination
<b>FBR</b> .....	Family Background Report
<b>GDP</b> .....	Gross Domestic Product
<b>GPOG</b> .....	General Principles and Operational Guidelines
<b>ICRMW</b> .....	International Convention on the Rights of Migrant Workers
<b>ILO</b> .....	International Labour Organization
<b>IOM</b> .....	International Organization for Migration
<b>KII</b> .....	Key Informant Interview
<b>MOUs</b> .....	Memorandums of Understanding
<b>P29</b> .....	Protocol of 2014 to the Forced Labour Convention, 1930 (No.29)
<b>PEA</b> .....	Promotion of Public Employment Agencies
<b>RMCS</b> .....	Regional Model Competency Standards
<b>SLBFE</b> .....	Sri Lanka Bureau of Foreign Employment
<b>SLFEA</b> .....	Sri Lanka Foreign Employment Agency
<b>TIP</b> .....	Trafficking in Persons
<b>UAE</b> .....	United Arab Emirates
<b>WHO</b> .....	World Health Organisation
<b>YoY</b> .....	Year on Year

# Introduction

Foreign employment has consistently been one of the largest sources of foreign exchange inflow in Sri Lanka.<sup>1</sup> The Central Bank statistics from 2019 indicate that more than 200,000 individuals leave Sri Lanka annually for foreign employment.<sup>2</sup> In terms of 'worker remittance in relation to GDP', Sri Lanka is placed within the top 5 countries in both South Asia and South-East Asia.<sup>3</sup>

The Sri Lankan workforce has consistently demanded employment opportunities in the skilled and semi-skilled sectors outside Sri Lanka.<sup>4</sup> Several factors can contribute to this consistent demand. Most of these migrant workers - such as domestic housekeeping assistants, hospital cleaners, waiters, drivers, and garment workers - are from meagre financial backgrounds.<sup>5</sup> Poverty and declining socio-economic conditions are predominant among these communities.<sup>6</sup> Reasons to find foreign employment are, therefore, closely associated with poverty and the absence of a stable income.<sup>7</sup> More importantly, weak financial backgrounds make these communities more vulnerable to becoming victims of trafficking in persons (TIP).<sup>8</sup>

TIP, also generally known as 'human trafficking' or 'modern slavery', refers to a crime where traffickers exploit or profit from using adults or children by forcing them to perform labour or engage in commercial sex.<sup>9</sup> Globally, most trafficking incidents occur in relation to sexual exploitation.<sup>10</sup> However, forced labour is the most common form of TIP found in Sri Lanka.<sup>11</sup> Situations of forced labour have characteristics such as abusive

working and living conditions, restriction of movement, and physical and sexual violence.<sup>12</sup> In Sri Lanka, the majority of forced labour incidents arise through recruitment agencies and intermediaries such as sub-agents.<sup>13</sup> Although Sri Lanka has the legal framework to prevent and counter TIP, the implementation of this legislation is weak.<sup>14</sup>

The U.S. Department of State Trafficking In Persons Report (2021)(U.S. TIP Report 2021) notes that the global economic downturn from the COVID-19 pandemic created an opportunity for traffickers to exploit the increasing number of migrants who are also vulnerable due to various economic hardships.<sup>15</sup> The report noted that, due to the pandemic, 'unethical recruitment practices' targeting women in Sri Lanka have increased.<sup>16</sup> As the demand for foreign employment has rapidly increased after COVID-19,<sup>17</sup> the potential for fraudulent and deceptive recruitment tactics by agents to take advantage of economically vulnerable communities in Sri Lanka has also increased.

Moreover, given the increasing economic hardships in the country, there has been an increased outflow of Sri Lankans seeking foreign jobs. It is reported that by May 2022, Sri Lanka's year-on-year (YoY) outward migration for foreign employment has increased to 105,821 (286% increase) in the first five months, compared to 27,360 in 2021.<sup>18</sup> As such, ensuring safe migration which protects the rights and entitlements of migrant workers against unscrupulous behaviours of various actors involved in the migration process, is more important than ever.



In terms of forced labour, it should be noted that a majority of the issues relating to migrant workers start in the origin country.<sup>19</sup> Therefore, fair and effective recruitment practices have a significant impact on preventing TIP incidents. Universally accepted principles of fair recruitment suggest that workers should be well-informed of all aspects of employment, including the nature of the employment, payment mechanisms, access to dispute resolution, and safe return.<sup>20</sup>

However, in Sri Lanka, several gaps can be seen in the existing legal framework as well as in the implementation of the law. Issues in the legal framework such as recruitment practices with limited government oversight, or tedious administrative processes drive potential migrant workers away from formal or legal means of securing overseas employment. Migrant workers who use these informal channels often end up being susceptible to exploitative tactics and victims of TIP.<sup>21</sup>

Therefore, identifying the gaps in the law and the deficiencies in the existing recruitment practices is important to effectively implement fair recruitment practices in Sri Lanka. It will be equally important in preventing potential migrant workers from exploitative behaviour, which can result in TIP.<sup>22</sup>

As such, this report will analyse and discuss the legal and policy issues surrounding recruitment practices for foreign employment that Sri Lankan migrant workers face. For this study, the team has selected issues relevant to three International Labour Organisation (ILO) General Principles on Fair Recruitment Practices. The report consists of four chapters. The first chapter will provide a detailed description of internationally recognised fair recruitment practices collated by the ILO, named the ILO General Principles. The chapter will also discuss the Sri Lankan legal framework relating to foreign employment, the country's institutional structure, and the extent to which it conforms with ILO General Principles. The second chapter will discuss legal and policy issues surrounding ILO General Principle 7 on the charging of recruitment fees in Sri Lanka, followed by possible solutions to the issues. The third chapter will discuss, in detail, issues related to dispute resolution that migrant workers face, and these issues will be discussed in light of ILO General Principle 13. The final chapter will identify the issues surrounding poor labour standards, violation of human rights of migrant workers, and possible solutions to these issues including how bilateral agreements between the origin country and destination country can improve the situation.

# Methodology

The research and recommendations on which this study is based draw from publicly available information, and are supplemented by interviews with key stakeholders within the foreign employment sector in Sri Lanka. The research team conducted eight key informant interviews (KIIs) as in-person meetings from November 2021 to February 2022 to triangulate the findings from the desk-based research.<sup>23</sup> Interviews conducted with stakeholders ranged from key government institutions and agencies to former migrant workers.

Verité Research has conducted studies in the area of migrant workers and human trafficking in the past. As such, the research team also drew upon a prior survey that was conducted in two parts in 2018, 2019 and 2020 that focused on the recruitment of workers for foreign employment. The surveys used a combination of qualitative and quantitative data collection methods with migrant workers, recruitment agencies and officers in the first instance (Sri Lanka Bureau of Foreign Employment (SLBFE)).<sup>24</sup> Verité had not analysed the proprietary data from this survey until this study. The team believed that the survey data would help in understanding the patterns and various issues that migrant workers and

agencies face. The data has been analysed as described in the following paragraph to support the findings of this report.

The quantitative component of the survey conducted by Verité comprised of analysing two datasets collected in two parts. One data set was collected from February 2018 to January 2019. The other data set was collected from February 2019 to January 2020. These datasets were administered to migrant workers and recruitment agencies, respectively, to collect a sample of opinions around the worker recruitment process, migrant work and the complaints process surrounding migrant work. The datasets were cleaned by removing respondents who had not answered any questions related to their demographic information. The final sample sizes for each dataset were 218 migrant workers and 109 recruitment agencies. The team analysed the data using tabulations and cross-tabulations to identify the most frequent responses. Small sample sizes derived from the survey, particularly related to the complaints processes, were the only datasets treated as qualitative data and analysed on a case-by-case basis to derive meaningful conclusions. Descriptive statistics were also used to analyse monetary data.

# CHAPTER 1:

## Fair Recruitment Practices, ILO General Principles and the Sri Lankan Legal Framework

This section describes in detail the definition of fair recruitment as per ILO General Principles and Guidelines and briefly describes the ILO General Principles. Thereafter, the section will lay out the Sri Lankan legal framework on foreign employment and the state institutional structure handling operations and complaints relating to migrant workers.

Sri Lanka currently has a considerable number of semi-skilled migrant workers departing every year.<sup>25</sup> In 2021 alone, Sri Lanka has sent 121,000 Sri Lankans for foreign employment and the SLBFE is reportedly tasked with sending 300,000 in 2022.<sup>26</sup> However, as stated above, the potential migrant workers are susceptible to becoming the victims of forced labour due to various factors. Fraudulent and exploitative practices of agents (including unregulated sub-agents), poverty, lack of awareness and lack of legal protection are predominant reasons for potential workers becoming vulnerable to forced labour.<sup>27</sup> Despite the laws in place to govern Sri Lanka's foreign

employment sector, some abusive labour practices such as breach of contractual terms, non-payment of wages, and lack of legal assistance still exist.<sup>28</sup> Furthermore, factors such as the lack of accountability of employers and the absence of willingness among officials to identify potential victims or implement appropriate mechanisms to prevent future harm, contribute to abusive labour. As a result, there is more room for traffickers to take advantage of migrants, which can result in forced labour incidents.<sup>29</sup>

As such, healthy recruitment practices significantly contribute to establishing good employment conditions.<sup>30</sup> Fair recruitment helps the migrant worker to understand what s/he can expect from the employment opportunity. Also, deceptive recruitment practices rarely lead to decent employment.<sup>31</sup> Similarly, unfair recruitment practices are usually symptomatic of the abusive conditions or harassment that may occur during employment.

### **1.1. DEFINITION – FAIR RECRUITMENT**

Fair recruitment does not have an internationally recognised definition. However, the concept of fair recruitment is based on the following vital conditions that such recruitment is carried out:

- a. with protection to workers from abusive or exploitative situations;
- b. with respect to fundamental principles of labour such as freedom of association and equal opportunity;

- c. with the assurance that workers have access to dispute resolution and can seek redress;
- d. in compliance with international labour standards and human rights standards;
- e. without discrimination based on sex, ethnicity, and religion;
- f. without workers incurring costs throughout the process;<sup>32</sup> and
- g. Several legally binding international instruments encompass certain conditions on fair recruitment,

setting standards of wages and occupational safety and health in relation to labour migrations and TIP. For instance, the Forced Labour Convention and Protocol of 2014 to the Forced Labour Convention, supported by Recommendation No. 203, aims to set up prevention, protection and compensation measures to eliminate all forms of forced labour.<sup>33</sup> Sri Lanka ratified the convention in 2003 and ratified the protocol in April 2019.<sup>34</sup> In addition to these binding instruments, the ILO has introduced a set of non-binding legal instruments named the General Principles and Operational Guidelines (GPOG) of fair recruitment, which countries are to use as a benchmark in framing national laws and policies.<sup>35</sup>

## 1.2. ILO GENERAL PRINCIPLES AND GUIDELINES ON FAIR RECRUITMENT

The ILO GPOG, adopted in 2016, identified 13 principles to promote fair recruitment.<sup>36</sup> The GPOG is grounded in international binding labour standards and conventions and has been collated to inform ILO's related organisations, national legislatures and social partners on promoting and ensuring fair recruitment.<sup>37</sup>

The GPOG defines the term 'recruitment' as including activities such as 'advertising, information dissemination, selection, transport, placement into employment and – for migrant workers – return to the country of origin where applicable, and this applies to both job seekers and those in an employment relationship.<sup>38</sup>

The distinction between the General Principles and the Operational Guidelines is that, while the General Principles are intended to be implemented at all levels, the Operational Guidelines allocate responsibilities to different actors in the recruitment process. Hence, the GPOG principles collectively cover many aspects such as charging of fees; labour market needs; transparency and protection in the recruitment process; and compliance with national and international agreements. Accordingly, the GPOG is a guidance mechanism recognised by ILO as a benchmark of fair recruitment practices that countries could adopt.<sup>39</sup>

The GPOG has laid out 13 General Principles of fair recruitment, which are detailed in Table 1.

**Table 1: ILO General Principles**

<b>Principle 1</b>	Recruitment laws and policies are in line with internationally recognised human rights.
<b>Principle 2</b>	Recruitment laws and policies respond to established labour market needs.
<b>Principle 3</b>	Appropriate legislation and policies on employment and recruitment should apply to all workers, labour recruiters and employers.
<b>Principle 4</b>	Recruitment should consider policies and practices that promote efficiency, transparency and protection for workers in the process.
<b>Principle 5</b>	Regulation of employment and recruitment activities should be clear and transparent and effectively enforced.

<b>Principle 6</b>	Recruitment across international borders should respect the applicable national laws, regulations, employment contracts and applicable collective agreements of countries of origin, transit and destination, and internationally recognised human rights, including the fundamental principles and rights at work.
<b>Principle 7</b>	No recruitment fees or related costs should be charged to, or otherwise borne by, workers or job seekers.
<b>Principle 8</b>	The terms and conditions of a worker's employment should be specified in an appropriate, verifiable and easily understandable manner.
<b>Principle 9</b>	Workers' agreements to the terms and conditions of recruitment and employment should be voluntary and free from deception or coercion.
<b>Principle 10</b>	Workers should have access to free, comprehensive, and accurate information regarding their rights and the conditions of their recruitment and employment.
<b>Principle 11</b>	Freedom of workers to move within a country or to leave a country should be respected.
<b>Principle 12</b>	Workers should be free to terminate their employment and, in the case of migrant workers, to return to their country.
<b>Principle 13</b>	Workers, irrespective of their presence or legal status in a state, should have access to free or affordable grievance and other dispute resolution mechanisms in cases of alleged abuse of their rights in the recruitment process, and effective and appropriate remedies should be provided where abuse has occurred.

### 1.3. SRI LANKA

Sri Lanka has ratified several important ILO conventions over the years that prevent forced labour and improve fair recruitment practices.<sup>40</sup> Recruitment for foreign employment in Sri Lanka has existed since the 1970s although the SLBFE only started regulating the operations of recruitment agencies in 1985 as a result of the Sri Lanka Bureau of Employment Act, No. 21 of 1985 (SLBFE Act).<sup>41</sup>

In relation to international conventions, the ILO conducted an assessment in 2019 on laws and policies in Sri Lanka in relation to migrant workers, namely 'Review of Law, Policy and Practice of Recruitment of Migrant Workers in Sri Lanka' (ILO Review of Law and Policy in SL).<sup>42</sup> This report evaluated the effectiveness of the implementation of Sri Lanka's laws and policies against the 13 principles of the GPOG.<sup>43</sup>

The assessment categorised the degree of alignment with each GPOG principle as:

**Fully aligned** - Evidence is available that policy and practice are fully aligned with ILO General Principles for Fair Recruitment;

**Partially aligned** - Evidence is available that policy and practice are partially aligned with ILO General Principles for Fair Recruitment; and

**Not aligned** - Evidence is available that policy and practice are not aligned with ILO General Principles for Fair Recruitment.

Table 2 below depicts the GPOG Principle and Sri Lanka's category of alignment with each principle.

**Table 2: Evaluation of law, policy and practice in Sri Lanka on recruitment for labour migration in relation to the ILO General Principles for Fair Recruitment<sup>44</sup>**

ILO General Principle	Evidence of alignment with ILO principles
<b>Principle 1</b> - Recruitment laws and policies are in line with internationally recognised human rights.	Partial
<b>Principle 2</b> - Recruitment laws and policies respond to established labour market needs.	Partial
<b>Principle 3</b> - Appropriate legislation and policies on employment and recruitment should apply to all workers, labour recruiters and employers.	Partial
<b>Principle 4</b> - Recruitment should take into account policies and practices that promote efficiency, transparency and protection for workers in the process.	Partial
<b>Principle 5</b> - Regulation of employment and recruitment activities should be clear and transparent and effectively enforced.	Partial
<b>Principle 6</b> - Recruitment across international borders should respect the applicable national laws, regulations, employment contracts and applicable collective agreements of countries of origin, transit and destination, and internationally recognised human rights, including the fundamental principles and rights at work.	Not aligned
<b>Principle 7</b> - No recruitment fees or related costs should be charged to, or otherwise borne by, workers or job seekers.	Partial
<b>Principle 8</b> - The terms and conditions of a worker's employment should be specified in an appropriate, verifiable and easily understandable manner.	Partial
<b>Principle 9</b> - Workers' agreements to the terms and conditions of recruitment and employment should be voluntary and free from deception or coercion.	Partial
<b>Principle 10</b> - Workers should have access to free, comprehensive and accurate information regarding their rights and the conditions of their recruitment and employment.	Partial
<b>Principle 11</b> - Freedom of workers to move within a country or to leave a country should be respected.	Partial
<b>Principle 12</b> - Workers should be free to terminate their employment and, in the case of migrant workers, to return to their country.	Partial
<b>Principle 13</b> - Workers, irrespective of their presence or legal status in a State, should have access to free or affordable grievance and other dispute resolution mechanisms in cases of alleged abuse of their rights in the recruitment process, and effective and appropriate remedies should be provided where abuse has occurred.	Not aligned

Sri Lanka is not aligned (category 3) with two GPOG principles, namely Principles 6 and 13. Sri Lanka has partial alignment with 11 principles.<sup>45</sup> Principle 7 (fee-charging) is a widely recognised issue in terms of migrant workers in all origin countries.<sup>46</sup> For this report, the selection of ILO General Principle 7 was due to the frequent occurrence of issues relating to the charging of unregulated fees in Sri Lanka. The ILO Review of Law and Policy in SL states that charging exorbitant amounts is a common occurrence despite many attempts to prevent high costs involved in the recruitment of migrant workers.<sup>47</sup>

As such, this report has selected the two principles that are not aligned with GPOG and one principle that has a partial alignment to discuss Sri Lanka's issues relating to recruitment practices in detail. Accordingly, the three areas are: (i) Principle 7 – issues relating to charging of fees; (ii) Principle 13 – issues relating to dispute resolution mechanisms; and (iii) Principle 6 – issues on practices that are non-compliant with basic human rights.

## 1.4. THE SRI LANKAN GOVERNMENT'S INSTITUTIONAL STRUCTURE AND LEGISLATION RELATING TO FOREIGN EMPLOYMENT

This section first highlights the salient provisions of the SLBFE Act and then provides a brief description of the key government institutions involved in regulating and facilitating the foreign employment sector.

The SLBFE Act is the principal enactment that governs the foreign employment sector in Sri Lanka. The SLBFE Act established the SLBFE, which is the principal government institution vested with the authority to manage foreign employment in Sri Lanka.

The original SLBFE Act in 1985 did not have provisions on the fees charged to migrant workers and recruitment agencies. The amendments to the SLBFE Act in 1994 and 2009<sup>48</sup> introduced revisions in relation to permitted fees that can be charged to the recruits (migrant workers), and declared unauthorised recruitments an offence.

The SLBFE Act mandates all local employment agencies to be licensed before carrying on such business, and such licenses are to be renewed annually.<sup>49</sup> The SLBFE Act states that, before the issuance of a license, the employment agency should also enter into an agreement

with the SLBFE, assuring to carry on the business in a morally irreproachable manner and to take all steps to ensure that the terms in the contract of employment between the foreign employer and the person recruited are observed by the foreign employer.<sup>50</sup>

The objectives of the SLBFE, as stipulated by the SLBFE Act, include the regulation of licensed recruitment agencies and assuring the welfare of migrant workers.<sup>51</sup> Among other things, the SLBFE is empowered to promote and develop overseas employment opportunities for Sri Lankans, carry out licensing of foreign employment agencies and regulate matters relating to the recruitment of migrant workers in Sri Lanka such as prescribing and charging fees.<sup>52</sup>

The recruitment of migrant workers and the affairs relating to foreign employment is handled by a detailed government institutional network in Sri Lanka ranging from the Ministry of Foreign Affairs, foreign missions and embassies and consular divisions to the SLBFE, which is governed by the State Ministry of Foreign Employment Promotions and Market Diversification.<sup>53</sup>

# CHAPTER 2:

## ILO General Principle 7 – Prohibition of charging fees and costs to workers

This section will first discuss the elements of ILO General Principle 7, and the key international instruments underlying Principle 7. It then provides a gap analysis of the national legislation with international conventions, followed by a detailed overview of the Sri Lankan context in relation to charging fees.<sup>54</sup> With the contraction of the global economy as a result of COVID-19, ILO indicates that the scarcity of foreign employment might increase pressure

on migrant workers to pay high fees to fight the competition.<sup>55</sup>

However, according to SLBFE officials, the government of Sri Lanka took an ambitious decision to send 100,000 migrant workers for foreign employment by the end of December 2021. Media reports indicate that this quota has been increased to 300,000 to be reached by the end of December 2022.<sup>56</sup>

### **2.1. DEFINITION**

In 2018, following global comparative research of domestic laws and policies on fees charged to workers during the recruitment process, the ILO recognised a global definition for 'recruitment fees and related costs'.<sup>57</sup> Recruitment fees or related costs are defined as 'any fees or costs incurred in the recruitment process for workers to secure employment or placement, regardless of the manner, timing or location of their imposition or collection'.<sup>58</sup>

Accordingly, any expenditure incurred during the process of recruitment for a worker to find employment falls under the ambit of 'recruitment fees' or 'related

costs'.<sup>59</sup> Thus, recruitment fees generally include the cost of a public or private recruiter's services to match employment offers and applications; payments for recruiting workers to perform employment for another; costs incurred during direct recruitment by the employer; and the recovery of recruitment fees from the worker.<sup>60</sup> Medical, insurance, skills and qualification tests, trainings, travel and lodging and administrative costs also fall within the ambit of 'related costs'.<sup>61</sup> This international definition of 'recruitment fees' and 'related costs' can be used as a guide to identifying what type of costs are charged during the recruitment process in Sri Lanka.



## 2.2. INTERNATIONAL INSTRUMENTS THAT PROSCRIBE THE CHARGING OF FEES FROM MIGRANT WORKERS

ILO General Principle 7 is developed as a culmination of various other international instruments that are detailed in Table 3 below.

**Table 3: Other International Instruments**

International instrument	Ratification status by Sri Lanka	General points
ILO's Migration for Employment Convention (Revised), 1949 (No. 97)	Not Ratified	'Public employment service in connection with the recruitment, introduction or placing of migrants for employment must be rendered free'. <sup>62</sup>
Private Employment Agencies Convention, 1997 (No. 181)	Not Ratified	To develop a regulatory framework for the member states to govern the employment agencies and to stipulate convention, that is 'to allow the operation of private employment agencies as well as the protection of the workers using their services'. <sup>63</sup>  The Convention also provides under Article 7 that 'Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers'.
The Domestic Workers Convention, 2011 (No. 189)	Not ratified	To effectively protect domestic workers – including migrant domestic workers recruited or placed by private employment agencies – against abusive practices, 'each Member shall take measures to ensure that fees charged by private employment agencies are not deducted from the remuneration of domestic workers' (Article 15(1)(e)). <sup>64</sup>
ILO Employment Service Convention, 1948 (No.88)	Not ratified	Sets forth parameters for member countries to maintain and ensure free public employment services and the compliance of employment services to the national framework. <sup>65</sup>
The Fee Charging Employment Agencies Convention (Revised), 1949 (No. 96)	Ratified	Allows countries to choose between the progressive abolition of fee-charging or regulation of fee-charging employment agencies.
Protocol of 2014 to the Forced Labour Convention, 1930	Ratified	The Forced Labour Convention, 1930 (No. 29) does not explicitly refer to issues of recruitment fees and related costs. The Protocol of 2014 to the Forced Labour Convention, 1930, calls for measures to prevent forced or compulsory labour to protect 'persons, particularly migrant workers, from abusive and fraudulent practices during the recruitment and placement process' (Article 2(d)).
Unemployment Convention, 1919 (No. 2)	Not ratified	The Unemployment Convention, 1919 (No. 2) requires member states to establish a system of free public employment agencies under the control of a central authority.  The Unemployment Recommendation, 1919 (No. 1) explicitly recommends that members take measures to prohibit the establishment of fee-charging agencies.

Ratification of international labour standards is a crucial aspect in determining a country's commitment to establishing a national regulatory framework to protect its migrant workers.<sup>66</sup> Ratification is where a state consents to be bound by the provisions within an international convention.<sup>67</sup> However, sometimes mere ratification of

an international convention is not enough. For instance, in Sri Lanka, as a dualist nation, the provisions of a particular international convention can only be implemented if such provisions in the convention were passed as domestic law. Countries such as the Kingdom of Saudi Arabia also follow this dualistic approach.<sup>68</sup>

The ILO recognises three important international labour instruments in relation to free recruitment and protection of workers’ rights, namely the: (i) ILO Employment Service Convention, 1948(No.88); (ii) ILO Private Employment Agencies Convention, 1997 (No. 181); and (iii) Fee Charging Employment Agencies Convention (Revised), 1949 (No. 96).<sup>69</sup>

**Box Item 1: Ratification of ILO’s Fee-Charging Employment Agencies Convention by the Gulf countries**

**BOX ITEM #1**

Out of the Gulf countries, only Syria has ratified the Fee Charging Employment Agencies Convention No. 96, whereas Iraq, Lebanon and Syria have ratified Convention No.88. However, none

of the Gulf countries have ratified the ILO Private Employment Agencies Convention No. 181.

As of 2010, ILO states that 88 of its member states have ratified Convention No.88, 23 have ratified Convention No.96 and 34 have ratified Convention No.181.<sup>70</sup> As Middle Eastern countries are a key destination to a majority of Sri Lankan migrant workers, it is important to assess the above information vis-a-vis the degree of protection afforded to migrant workers from exploitative practices in charging fees. As noted in Box Item #1, many have not ratified the above three conventions.

In relation to Sri Lanka, one of the most important conventions on the fee-charging aspect is the Fee-Charging Employment Agencies Convention (Revised).

**2.3. FEE-CHARGING EMPLOYMENT AGENCIES CONVENTION: IMPLEMENTATION IN SRI LANKA**

Sri Lanka ratified the Fee-Charging Employment Agencies Convention (Revised) 1949 (No. 96) (Fee Charging Convention) on 30 April 1958 having accepted articles under Part III of the Convention.<sup>71</sup>

The Convention seeks to abolish and/or regulate Fee-Charging employment agencies. The Convention’s categorisation of employment agencies is two-fold: (i) agencies operating with a view to profit and (ii) agencies operating without a view to profit.<sup>72</sup>

Figure 1: Elements of the Fee-Charging Convention

**FEE-CHARGING EMPLOYMENT AGENCIES CONVENTION (REVISED) 1949 (NO. 96)**



Agencies that do not conduct business to profit under Part III are required to have an authorisation from the competent authority and should be under the supervision of such competent authority.<sup>73</sup> Such agencies should not make any charges unless prescribed by the competent authority. The Convention also states that appropriate penalties, including the withdrawal of a license for any

violation of the Convention, should be prescribed by the authorities.<sup>74</sup>

The following table sets out the provisions of the Convention (Part III) and the provisions in the SLBFE Act to draw a comparison of the implementation of the Convention in Sri Lanka.

**Table 4: Implementation of the Fee-Charging Employment Agencies Convention in Sri Lanka**

Fee-Charging Employment Agencies Convention (Revised) on 30 April 1958 – Part III	Provisions in the SLBFE Act	Legal gap analysis
<p>Article 10<sup>75</sup></p> <p>Fee-charging employment agencies with a view to profit shall:</p> <p>(a) be subject to the supervision of the competent authority;</p> <p>(b) be required to have a yearly licence renewable at the discretion of the competent authority;</p> <p>(c) only charge fees and expenses on a scale submitted to and approved by the competent authority or fixed by the said authority;</p> <p>(d) only place or recruit workers abroad if permitted so to do by the competent authority.</p>	<p>Section 24(1) – Any person other than the Bureau, shall not carry on the business of a foreign employment agency without a licence issued under the Act.</p> <p>Section 43 – The Bureau can issue directions to a licensee as it may think necessary for making the licensee comply with the provisions of the Act and any regulation made thereunder.</p> <p>Section 51A – If any licensee does not receive any commission or any other payment to secure employment opportunities outside Sri Lanka, <u>he may charge the actual expenses to be incurred</u>, in addition to the registration fee, to any recruit after having obtained prior approval for the same from the Bureau.</p> <p>Section 51(4) – Of the amount paid by migrant workers to the Bureau, the Bureau retains 20 per cent of the sum, allocates 10 per cent to the Workers Welfare Fund (the insurance scheme provided to Sri Lankan migrant workers) and distributes 70 per cent of the sum to the licensed recruitment agency in the event the agent assisted in securing foreign employment for the worker.<sup>76</sup></p> <p>Section 28 – Before the issuance of a license, the agency shall enter into an agreement with the Bureau assuring:</p> <p>(i) to carry on the business in a morally irreproachable manner; and</p> <p>(ii) to take all steps as are reasonably possible to ensure that the terms and conditions of the contract of employment between a foreign employer and a migrant worker are observed by that employer.</p>	<p>Sri Lanka complies with Article 10.</p>
<p>Article 11</p> <p>Fee-Charging employment agencies not conducted with a view to profit:</p> <p>(a) shall be required to have authorisation from the competent authority and shall be subject to supervision;</p> <p>(b) shall not make any charge over the scale of charges submitted to and approved by the competent authority; and</p> <p>(c) shall only place or recruit workers abroad if permitted to do so by the competent authority.</p>	<p>-</p>	<p>Article 11 does not apply to Sri Lanka as all agencies are conducted with a profit purpose.</p>

Fee-Charging Employment Agencies Convention (Revised) on 30 April 1958 – Part III	Provisions in the SLBFE Act	Legal gap analysis
Article 12 The competent authority shall take the necessary steps to satisfy itself that non-Fee-Charging employment agencies carry on their operations gratuitously.	-	Article 12 does not apply to Sri Lanka.
Article 13 Prescribing appropriate penalties including the withdrawal, when necessary, of the licences and for any violation of the provisions of this Part of the Convention. <sup>77</sup>	Section 62 - Unauthorised recruitment is an offence charged with imprisonment or fine or both. Section 64 - Any person who: (a) with a license, charges any fee otherwise than as authorised by the Act, to provide or secure employment outside Sri Lanka for any other person; or (b) not being a license holder, demands or receives or attempts to receive for himself or any other person, any money to provide or secure employment for any person outside Sri Lanka; shall be guilty of an offence.	Sri Lanka complies with Article 13.

## 2.4. EXISTING SRI LANKAN LEGAL FRAMEWORK ON GENERAL PRINCIPLE 7 AND IDENTIFICATION OF ISSUES

Given the comparison above, it appears that the provisions of the SLBFE Act in respect of regulating licensed recruitment agencies are compliant with the provisions under Part III of the Fee-Charging Convention.

However, in practice, it is reported that inexplicable fees are being charged from the migrant workers by licensed recruitment agencies.<sup>78</sup> These fees usually exceed what is stipulated in the SLBFE Act and by relevant regulations.<sup>79</sup>

The maximum chargeable fee from a migrant worker as stipulated by the SLBFE in Circular No. 14/2019 issued on 6 August 2019<sup>80</sup> is as follows:

- LKR 20,000 – advertisement expenses
- LKR 5,000 – communication
- LKR 3,000 – courier charges
- LKR 17,837 – SLBFE registration
- LKR 2,000 – Translation of visa
- One month’s salary payment (the Middle East and South Asia)/two month’s salary (Europe and other countries) – for administrative and promotional expenses
- Actual costs – visa, airfare

The circular also explicitly prohibits the agencies from charging the fees specified below, as such fees could be directly borne by the migrant worker:

- Trade Test fee
- Training fees
- Fees to obtain Police Clearance Certificate
- Cost of medical test
- Document attestation charges payable to the Ministry of Foreign Affairs

[See Annex 1 for a brief outline of the job approval process that applies to licensed agencies as well as workers who secure employment through friends and family.]

## 2.5. RECRUITMENT METHODS

In relation to fees involved in the recruitment process, there are two methods used by private agencies in Sri Lanka, namely:<sup>81</sup>

1. free recruitment and
2. fee recruitment.

### FREE RECRUITMENT

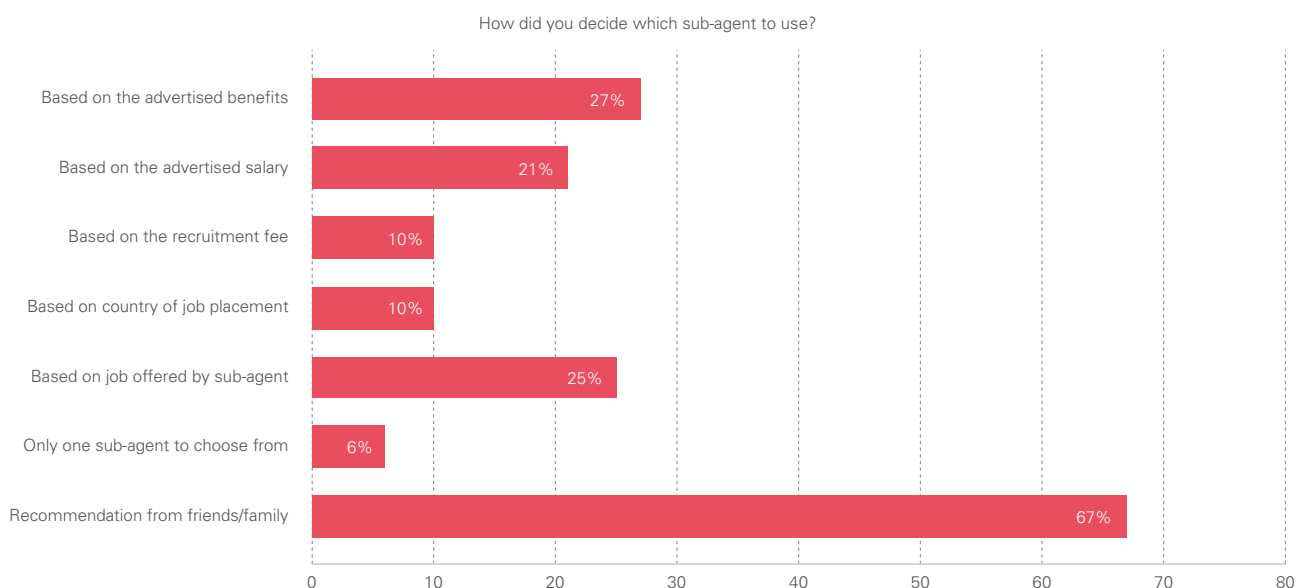
- Used in Sri Lanka only to recruit domestic female migrant workers such as housekeeping assistants.
- The migrant worker bears no cost during the recruitment process.
- The employer covers the full cost of recruiting the migrant worker.
- Three months' salary is paid to the migrant worker by the employer (via the local agent) before the departure.
- Agencies deduct their costs from this payment and hand over the rest to the migrant worker.
- Although domestic workers are not supposed to be charged any costs as they are recruited under the 'free method', the Verité survey data in 2017 suggests that nearly 27 per cent of migrant domestic female workers interviewed for the study have paid some sort of fee to the agency or the sub-agency.<sup>82</sup> The data suggests that most fees paid are to cover air travel-related expenses.

### FEE RECRUITMENT

- Used to recruit migrant workers for all employment groups, except female domestic workers.
- The migrant worker bears the full cost of the recruitment. The costs are either paid to the agent or paid directly to the relevant institution.
- Workers mostly resort to informal loans from family and friends to bear such costs.<sup>83</sup>
- Costs include:
  - a. SLBFE registration fee;
  - b. Visa cost;
  - c. Migrant's training fee;
  - d. Medical certificate;
  - e. Insurance cost;
  - f. Advertising costs of the agency;
  - g. Airfare;
  - h. Transportation (both domestic and overseas); and
  - i. Costs borne by the agencies for any dispute resolution;

## SUB-AGENTS

Figure 2: How did you decide which sub – agent to use?<sup>84</sup>



Klls and Verité’s survey data reveal that sub-agents are commonly used by agencies to recruit female domestic workers from rural areas. According to the study, 48 per cent of migrant workers used or contacted sub-agents to find foreign employment.<sup>85</sup> The study also revealed that migrant workers who contacted sub-agents had to contact on average a maximum of four sub-agents. Friends and family (67 per cent) were the primary mediums through which sub-agents were found and contacted.

However, only 5 per cent and 6 per cent of sub-agents who approached construction workers and domestic workers, respectively, have charged a fee.<sup>86</sup>

According to ILO, payment arrangements between agencies and sub-agents usually include upfront incentives, flat rates and variable rates.<sup>87</sup> Licensed agencies indicated different payment arrangements between agencies and sub-agents, such as payment of a commission for every migrant worker introduced.

## 2.6. EMPLOYMENT THROUGH PRIVATE SOURCES

SLFBE statistics for 2020 reveal that a majority of male migrant workers travel abroad without the assistance of an employment agency.<sup>88</sup> On the other hand, female

migrant workers have mostly found employment through the use of an agency in 2020. However, the direct method is still considered a popular method.<sup>89</sup>

Figure 3: Migration through private sources and agencies based on gender – 2020<sup>90</sup>

The KIIs noted that migrant workers who use the direct method to find employment are also often charged a certain amount through a commission by their contact overseas. Nevertheless, KIIs revealed that complaints

on exorbitant amounts being charged in this method are few, as migrants who go through private sources are usually more seasoned and are familiar with the process.

## 2.7. ISSUES CONNECTED TO CHARGING FEES

### DISCRIMINATORY FEE CHARGING

The current legislation does not differentiate costs and fees involved in the migration process based on the skill/job category. However, the practice carried out, in reality, is a uniform application of fees across all sectors, except for domestic workers, that renders non-domestic workers to be subject to discriminatory treatment. This is because domestic workers are recruited under a free-recruitment model where the migrant worker does not have to bear any costs in the recruitment process. The female domestic workers are usually paid an incentive advance payment before their departure. However non-domestic workers do not receive this facility. They have to bear all recruitment costs out of their own pocket and the prices of fees charged are based on market rates at the discretion of the agents. The fees mostly vary without an identifiable criterion to aid differentiation.<sup>91</sup> KIIs revealed that generally larger local agencies are savvy enough to

engage directly with foreign agencies or the employers to set costs whereas smaller local agencies that lack this network are beholden to the price set by foreign agencies or the employer. The absence of a level playing field among agencies, therefore, creates unfair competition among agencies and has resulted in highest costs for migrant workers. Hence, there is a lack of transparency and clarity in terms of how and what factors influence the determination of fees involved for non-domestic workers.

### CHARGING OF A VARIABLE COST IN AN INFORMAL MANNER

According to the ILO and as confirmed by the KIIs, variable costs such as service charges or maintenance fees are also directly charged from the migrants by some agents in addition to the authorised costs by the SLBFE.<sup>92</sup> However, these expenses charged to the migrants are explicitly prohibited under Circular No. 14/2019.

As noted in the KIs with agencies, medical costs and the costs of training courses are also charged to the migrant workers by some agencies. However, charging these costs to migrant workers is explicitly prohibited as the migrants can pay for such expenses directly. The SLBFE confirmed that during the screening process (the first approval process), the SLBFE does not approve any costs to be charged to the migrant workers that are not expressly allowed as per the circular (See Annex for the job approval process). It should be noted that the costs are reviewed by the SLBFE only at the first approval stage, and there is no follow-up monitoring process to check if the actual amounts charged to the workers are only the approved charges.<sup>93</sup> In relation to other costs, the KIs with agencies showed that the administrative tasks attached in relation to the first approval process (the process allowing agencies to recruit workers for a particular job order from the SLBFE) add an administrative cost to the agent.<sup>94</sup> Therefore, these costs, although not legally permitted, are usually passed on to the migrant worker.<sup>95</sup>

However, agents mentioned that all costs charged from the migrant workers are as per the approval received from the SLBFE for each job order. As such, some agents categorically stated that all costs charged to the migrant workers only consist of the actual expenses the agencies incur in respect of each migrant worker and they are approved by the SLBFE. However, during KIs, migrant workers expressed a different view and noted that some agents also hide their share of profit/commission disguised as an actual expense.

### **LACK OF COMMITMENT BY WORKERS**

According to the KIs, migrants' lack of commitment to complete the recruitment process has compelled the agencies to use extra precautions to prevent the agency from incurring losses. For instance, the KIs showed anecdotally that migrant workers tend to abandon the migration process halfway for various reasons such as family concerns. Agents complained that female workers tend to enrol themselves for domestic work outside Sri Lanka, receive the advance money paid by the employer and then disappear. According to the KIs,

frequent incidents of this nature have compelled these agencies to adopt the practice of handing over one-third of the advance salary received by the employer to the migrant workers before departure. Agencies will, therefore, retain the rest of the salary until after the migrant worker's departure. The migrant workers, in their KIs, also reported incidents of agents retaining the migrant's passport until the day of the departure. The KIs with agencies showed that this method is used to prevent migrant workers from registering with several agencies with the same passport.

Therefore, as a method of covering losses arising from operational difficulties in the recruitment process as noted above, agents usually equip themselves with an allocation of a 'cushion', which is usually added to the agent's commission.<sup>96</sup>

### **ILLCIT PAYMENT/KICKBACKS**

The KIs with migrant workers pointed to a few issues related to illicit payments and/or kickbacks to various personnel. These payments have mostly been made by migrant workers to various parties who promised a job overseas or agreed to put the worker in touch with the SLBFE to secure a job. According to migrant workers, the most common victims of these illicit payments are female workers. Most of these females are from rural areas and, therefore, lack frequent connections with licensed agencies or networks such as friends, relatives or family members with a previous foreign employment background.<sup>97</sup>

### **BURDEN OF PROOF**

There are also issues about prosecuting offences (such as overcharging) committed under the SLBFE Act. According to the Act, if a complaint is received against an unauthorised action carried out by a licensed agent, and if such action is proved in court, the agent will be charged with a fine or imprisonment.<sup>98</sup> However, during the KIs with the SLBFE, the interviewee noted that if the complaint is in relation to unauthorised fees being charged to a particular migrant worker, the payment of



such amounts has to be established in court with documentary evidence such as receipts or bank transfers. This requirement to present documentary evidence stems from the burden of proof that falls upon the complainant in legal proceedings. Therefore, if the complainant alleges that the licensed agent has charged an amount exceeding the threshold specified in the SLBFE Act, then the burden of proving this also lies on the

complainant. However, it must be noted that although the law requires some proof as evidence, securing documentary evidence of the unscrupulous behaviour of an agency may be difficult.

In light of the above, there is no doubt that migrant workers face a variety of issues in terms of costs incurred during their recruitment process.

## 2.8. SUMMARY OF ISSUES

- a. **Variable costs** – the costs charged by unlicensed sub-agents, friends or other contacts in the direct method remain largely undocumented and there is limited credible data to fully understand the prevalence of this phenomenon.
- b. **Lack of transparency and limited visibility of the process to migrant workers** – the migrant workers have limited visibility of the overall process involved and the recruitment fees charged to migrant workers by local licensed agents differ without an identifiable criterion for such differentiation. This leaves much room for intermediaries such as sub-agents to exploit the migrant workers by charging fees outside the criteria defined by the SLBFE.
- c. **Difficulty of presenting documentary proof to establish unscrupulous acts** – securing evidentiary proof to confirm the excess or unauthorised fees charged by agencies or other intermediaries in a court of law is practically difficult. This is because, generally, unscrupulous actors are careful to not leave behind any evidence. For instance, the intermediaries such as sub-agents do not issue receipts for amounts charged over and above the authorised amount.<sup>99</sup> Oftentimes, these intermediaries use deceptive tactics that make it hard to be traced back. In such events, the migrant worker is left with no evidence to prove the extra amount he/she was charged.<sup>100</sup>

## 2.9. INTERNATIONAL BEST PRACTICES IN RESPECT OF PROHIBITING THE CHARGING OF RECRUITMENT FEES TO MIGRANT WORKERS

This section briefly discusses the international best practices in relation to charging fees to migrant workers.

The predominant challenge in implementing fair recruitment practices in terms of charging fees lies in governance. The lack of capacity to supervise recruitment processes and the placement of semi-skilled workers in Middle Eastern countries pose a significant threat to adopting fair recruitment.<sup>101</sup> There are, however, a few examples of best practices used by other countries in this regard.

A majority of countries that send their workers for foreign

employment have general legislation that applies across all sectors of workers. However, a few countries such as Australia, New Zealand and Canada have sector-specific legislation, policies and programmes, to address protection afforded to workers. For instance, New Zealand has a 'Recognised Seasonal Employer' scheme, that allows employers to fill vacant positions with priority given to migrant workers from specific countries.<sup>102</sup> This allows workers to enter specific labour markets, by choosing an employer with clearly defined immigration costs involved for that specific job category. This process explicitly identifies the immigration costs such as travel costs and visa service fees applicable for a given employment sector.<sup>103</sup>

The Philippines is another example of a country that provides clear identification of fees per sector, although it is not a country that has ratified the Fee-Charging Employment Agencies Convention (Revised) Convention. It is quite similar to Sri Lanka in that all charges by a recruitment agency to a worker must be prescribed by the Secretary of Labour.<sup>104</sup>

#### Box Item 2: Philippines fee-charging system

##### **BOX ITEM #2**

##### ***Philippines fee-charging system***

The Philippine's law clearly sets out the charges that should be borne by each stakeholder in the recruitment process. These charges also differ based on the job category of the migrant worker. The law indicates that a placement fee of one month's salary can be charged from a migrant

worker, except from domestic workers or workers to be deployed to countries where direct recruitment fees are allowed. Philippines law also clearly defines the specific costs a worker has to bear and the specific costs an employer has to incur in relation to a particular migrant worker. Accordingly, the migrants are required to bear the costs for passports and police clearance and the employers are required to bear expenses incurred for visa, airfare, transportation from the airport to place of employment, and other administrative fees.

The ILO has recommended that Sri Lanka adopt a similar policy as practised in the Philippines where the employer is required to pay for 'pre-determined cost components such as visa, airfare and transportation'.<sup>105</sup> This recommendation is further discussed in the following section.

## **2.10. RECOMMENDATIONS**

As stated at the beginning, Sri Lanka has consistently seen an increase in the number of individuals seeking employment in Middle Eastern countries. This is despite the costs related to recruitment for work in Middle Eastern countries being significantly high compared to other regions.<sup>106</sup> Many of the Middle Eastern countries have national laws in force that have prohibited charging of fees or commission from migrant workers in return for providing employment which is not prescribed by the Ministry of Labour.<sup>107</sup> For example, the United Arab Emirates (UAE) Article 18 of Labour Law, 1980 provides that 'no licensed employment agent or labour suppliers shall demand, before or after admission to employment, any commission or reward in return except costs as prescribed by law'.<sup>108</sup> There are similar laws in Bahrain, Saudi Arabia and Qatar.<sup>109</sup> Furthermore, an ILO study notes that the Middle Eastern region collectively has nine policies completely prohibiting the charging of fees and costs to workers and job seekers unless otherwise provided by law.<sup>110</sup>

In this context, regulations must be formulated to

add clarity to the fees or costs involved in the recruitment processes in Sri Lanka. The following are a few recommendations:

- 1. Developing a sector-based fee/cost structure** – As stated above, currently the SLBFE Act and the circulars stipulate fees or costs that are applied generally to every worker who leaves the country, across all sectors of jobs, except for domestic female workers.

The KIIs with SLBFE officials also revealed that although there is a pre-approval process of costs to be charged to each migrant worker under a particular job order, there is no follow-up mechanism to review whether the approved costs by the SLBFE are the ones that were actually charged to the workers. As there is no follow-up reviewing process, the licensed agencies can easily overlook the fee caps imposed by the SLBFE.

Therefore, Sri Lanka should introduce regulations under the SLBFE Act – similar to the New Zealand

model or the model used in the Philippines above – that distinctively identify the costs each migrant worker would incur based on their job category and destination. The delineation of fees/costs that a migrant worker can incur in terms of securing a foreign employment opportunity would provide clarity to potential workers, employers and local/foreign agencies. Pre-identification of each cost item, for job categories and destinations, will also reduce the space for any intermediary to manipulate potential migrant workers to pay unauthorised amounts. This will also strengthen Sri Lanka’s conformity in terms of the ILO Fee-Charging Convention where, under Article 4, the competent authority – in this instance, the SLBFE – is bound to eliminate ‘all abuses connected with the operations of fee-charging employment agencies’.<sup>111</sup>

2. **Clearly define the costs through legislation** – Circular No. 14/2019 is the principal legislation currently in force that specifically identifies the fees that can be charged to migrant workers. However, the language used in the circular to identify specific cost categories is too wide and vague. For instance, cost categories such as ‘*communication, administrative and promotional expenses*’ and ‘*any other actual expenses related to the relevant recruitment*’ are too broad. Therefore, these cost categories are susceptible to exploitation by agencies that may push costs

unrelated to the recruitment process toward the workers. Merely providing a statutory fee cap is not sufficient if the costs that fall within that category are indescribable. Hence, permitted fee categories must be identified in detail through legislation. This will (i) clearly identify the cost items, preventing agencies from parking any hidden costs within those categories, (ii) provide a fee cap for each cost item, and (iii) add clarity and visibility to migrant workers and the SLBFE to identify the charges involved.

3. **Promotion of Public Employment Agencies (PEAs)**

– The ILO indicates that public employment services can be used to target development objectives such as reducing migration costs.<sup>112</sup> This will likely increase employment opportunities for potential migrant workers that cannot afford the fees of private agencies. Public employment services backed by government arrangements (as in the Republic of Korea) have significantly reduced the costs paid by a worker, partly due to the higher transparency involved.<sup>113</sup> Sri Lanka has one public employment agency, i.e. the Sri Lanka Foreign Employment Agency (SLFEA). Sri Lanka can use the SLFEA to secure bilateral arrangements with other countries to reduce migration costs through reducing visa fees and negotiating free training courses.

# CHAPTER 3:

## ILO Principle 13 – Access to Grievance and other Dispute Resolution Mechanisms

This section discusses Sri Lanka's practices with regard to ILO General Principle 13, which deals with the dispute resolution mechanisms available to migrant workers. The section will first detail the international standards articulated under the GPOG and other guidelines issued by the ILO. It will then identify the relevant international instruments and the Sri Lankan legal framework that address dispute resolution mechanisms. Finally, the section will analyse the issues and gaps in the legal framework in comparison to

the best practices recommended by the ILO GPOG and international instruments.

In relation to dispute resolution of migrant workers, the ILO Review of Law and Policy reports that Sri Lanka exhibits no evidence of conformity with GPOG Principle 13.<sup>114</sup> One of the key findings is that Sri Lanka needs significant developments in the existing methods and procedures used to resolve disputes of migrant workers. Therefore, this principle was selected to identify gaps and y areas for improvement.

### 3.1. ILO PRINCIPLE 13 - DEFINITION

The GPOG Principle 13 stipulates that 'workers, irrespective of their presence or legal status in a state, should have access to free or affordable grievance and other dispute resolution mechanisms in cases of alleged abuse of their rights in the recruitment process, and effective and appropriate remedies should be provided where abuse has occurred'.<sup>115</sup>

The GPOG provides specific responsibilities for key actors in the recruitment process such as governments, labour recruiters and employers.

#### A. **Governments should:**

- ensure that effective grievance and other dispute resolution mechanisms are available, accessible and affordable;
- provide prompt redress for workers who have encountered abuse during the recruitment process;
- enable redress mechanisms to be accessed across borders;<sup>116</sup>

- take appropriate measures through judicial, administrative, legislative and other means, to ensure that remedies are not limited to compensation;<sup>117</sup>
  - safeguard whistle-blowers or complainants until investigations are concluded; and
  - promote policies that eliminate discriminatory treatments such as factors that instill a fear of detention or deportation on the migrant workers.<sup>118</sup>
- B. Labour recruiters should:**
- undertake due diligence regarding their recruitment activities; and
  - ensure that workers are not deceived concerning living conditions.<sup>119</sup>
- C. Employers should:**
- support workers and avoid interfering with or preventing workers from accessing grievance and dispute resolution mechanisms;<sup>120</sup> and
  - respect the freedom of migrants to leave or change employment or return to their country of origin.<sup>121</sup>

### 3.2. INTERNATIONAL INSTRUMENTS RELATING TO MIGRANT WORKER DISPUTE RESOLUTION

This section lays out several key international instruments that address dispute resolution of migrant workers, along with salient provisions under each instrument.

**Table 5: International Instruments on migrant worker dispute resolution**

International instrument	Salient provisions	Ratification status (Sri Lanka)
C029 - Forced Labour Convention, 1930 (No. 29)	Article 25 - The illegal exaction of forced or compulsory labour should be punishable as a penal offence, and each member should ensure that the penalties imposed by law are adequate and strictly enforced.	<b>Ratified</b>
P029 - Protocol of 2014 to the Forced Labour Convention, 1930	<ul style="list-style-type: none"> <li>• Article 1 - Each member shall take effective measures to prevent and eliminate forced labour, provide protection to victims and access to appropriate and effective remedies such as compensation and sanction the perpetrators of forced or compulsory labour.</li> <li>• Article 2 (c)(i) - Undertake efforts to ensure the coverage and enforcement of legislation to prevent forced labour and apply labour laws across all sectors of workers.</li> <li>• Article 4 - Take the necessary measures to ensure that victims of forced labour are not penalised for their involvement in unlawful activities that they have been compelled to commit as a direct consequence of being subjected to forced labour.</li> <li>• Article 5 - Members shall cooperate to prevent and eliminate forced labour.</li> </ul>	<b>Ratified</b>

International instrument	Salient provisions	Ratification status (Sri Lanka)
C181 - Private Employment Agencies Convention, 1997 (No. 181)	Article 10 - The competent authority shall ensure that adequate machinery and procedures exist for the investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies.	<b>Not ratified</b>
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	Article 76 - A state party to the present Convention may at any time declare under this article that it recognises 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.  Article 78 - The provisions of Article 76 of the Convention shall be applied without prejudice to any procedures for settling disputes or complaints in the field covered by the present convention laid down in the constituent instruments of, or in conventions adopted by, the United Nations and the specialised agencies and shall not prevent the state parties from having recourse to any procedures for settling a dispute in accordance with international agreements in force between them.	<b>Ratified</b>
Multilateral Framework on Labour Migration*  * Non-binding principles and guidelines for a rights-based approach to labour migration	<b>Guideline 2.6</b> - Promoting bilateral and multilateral agreements between workers' organisations in origin and destination countries providing for the exchange of information and transfer of membership.  <b>Guideline 10.8</b> - Providing information to migrant workers on their rights and assisting them with defending their rights.  <b>Guideline 10.11</b> - Offering legal services, in accordance with national law and practice, to migrant workers involved in legal proceedings related to employment and migration.  <b>Guideline 12.1</b> - Facilitating migrant workers' departure, journey and reception by providing, in a language they understand, information, training and assistance before their departure and on arrival concerning the migration process, their rights and the general conditions of life and work in the destination country.  <b>Guideline 12.5</b> - Networking between workers' organisations in origin and destination countries to ensure that migrant workers are informed of their rights and are provided with assistance throughout the migration process.  <b>Guideline 14.3</b> - Improving the labour market position of migrant workers, for example, through the provision of vocational training and educational opportunities.	ILO notes that Sri Lanka has implemented some practices that align with the Multilateral Framework on Labour Migration principles and guidelines. <sup>122</sup>  This is specifically in relation to the protection of migrant workers (human rights and recruitment). <sup>123</sup>

### 3.3. SRI LANKAN LEGAL FRAMEWORK ON MIGRANT DISPUTE RESOLUTION

This section highlights the key provisions in the SLBFE Act and the Penal Code in relation to the resolution of migrants' disputes.

#### SLBFE Act

- The recruitment agencies are required to sign an agreement with the SLBFE at the time of obtaining the license. This agreement indicates that the

agency will take measures to ensure the terms and conditions of employment are observed by the employer.<sup>124</sup>

- The SLBFE has a statutory responsibility to inquire about any complaints lodged by a migrant worker or any person on his/her behalf regarding any breach of the employment contract by the employer.<sup>125</sup>

- Where the SLBFE receives a complaint from a migrant worker, for breach of terms in the contract of employment by the employer or of terms and conditions by the licensed agency, the SLBFE is authorised to make an appropriate award after an inquiry.<sup>126</sup>
- The Association of Licensed Employment Agencies (ALFEA): ALFEA is an entity established under the SLBFE Act to oversee licensed agencies and facilitate the resolution of disputes arising from activities conducted by agencies. Functions of the ALFEA include the resolution of disputes and disagreements between licensees.<sup>127</sup>

### Penal Code of Sri Lanka

- In addition to the SLBFE Act, the Penal Code of Sri Lanka identifies labour exploitation or forced labour as a punishable offence.<sup>128</sup> As such, a victim of forced labour can seek redress against commercial labour exploitation in court. Forced labour in relation to foreign employment is a common occurrence in Sri Lanka and it mostly originates at the recruitment stage.<sup>129</sup> TIP incidents of forced labour can, therefore, be prosecuted under section 360C of the Penal Code.

## 3.4. GAPS IN THE LEGAL, POLICY AND IMPLEMENTATION MECHANISMS

This section discusses gaps identified in the existing legal framework in relation to dispute resolution of migrant workers. The section will elaborate on legal and policy issues pertaining to handling complaints made by migrant workers, difficulties in enforcing the law and other issues migrant workers have to endure during the dispute resolution process.

### Complaints handling, investigations and enforcement

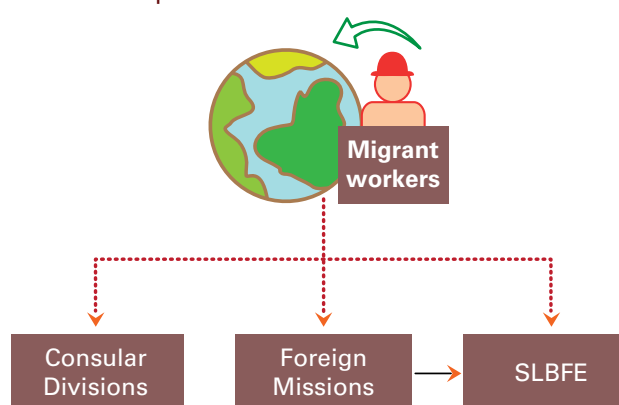
This section discusses in detail the practical issues in relation to handling complaints by the SLBFE.

#### a. Existing mechanism

The SLBFE has a digitised method that enables migrant workers or a family member on his/her behalf to file a complaint. All complaints received from migrant workers or their family members are recorded in the Conciliation Division at the SLBFE. Complaints can be made either online or by visiting the SLBFE or one of its regional

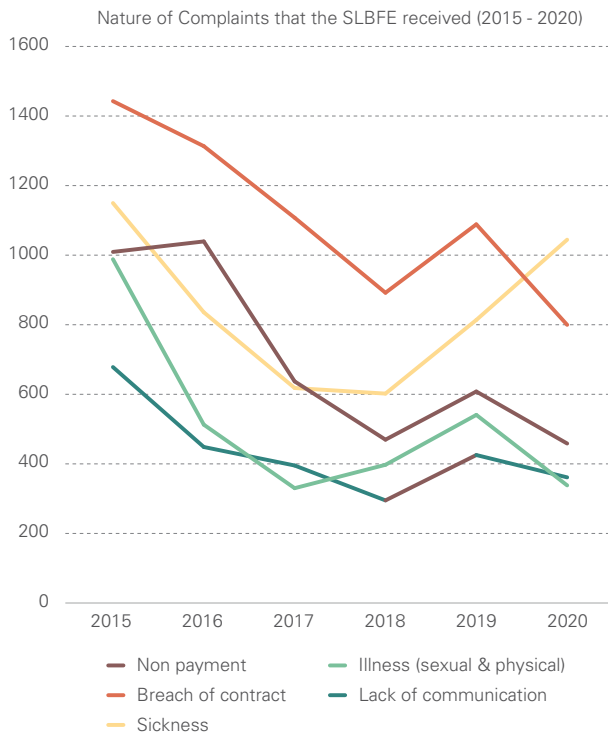
offices.<sup>130</sup> According to KIIs with SLBFE officials, once a complaint is received, all information received from the complainant is recorded in an information sheet. The SLBFE, Ministry of External Affairs and Consular Divisions all coordinate in the resolution of disputes faced by migrant workers.<sup>131</sup> The SLBFE officers then follow up on the complaints with the migrant workers through several rounds of inquiries (maximum three).

Figure 4: Institutions that handle Sri Lankan migrant workers' complaints



Figures 5 and 6 below will depict the nature of complaints received by the SLBFE and a comparison of the complaints received and settled by SLBFE over five years.

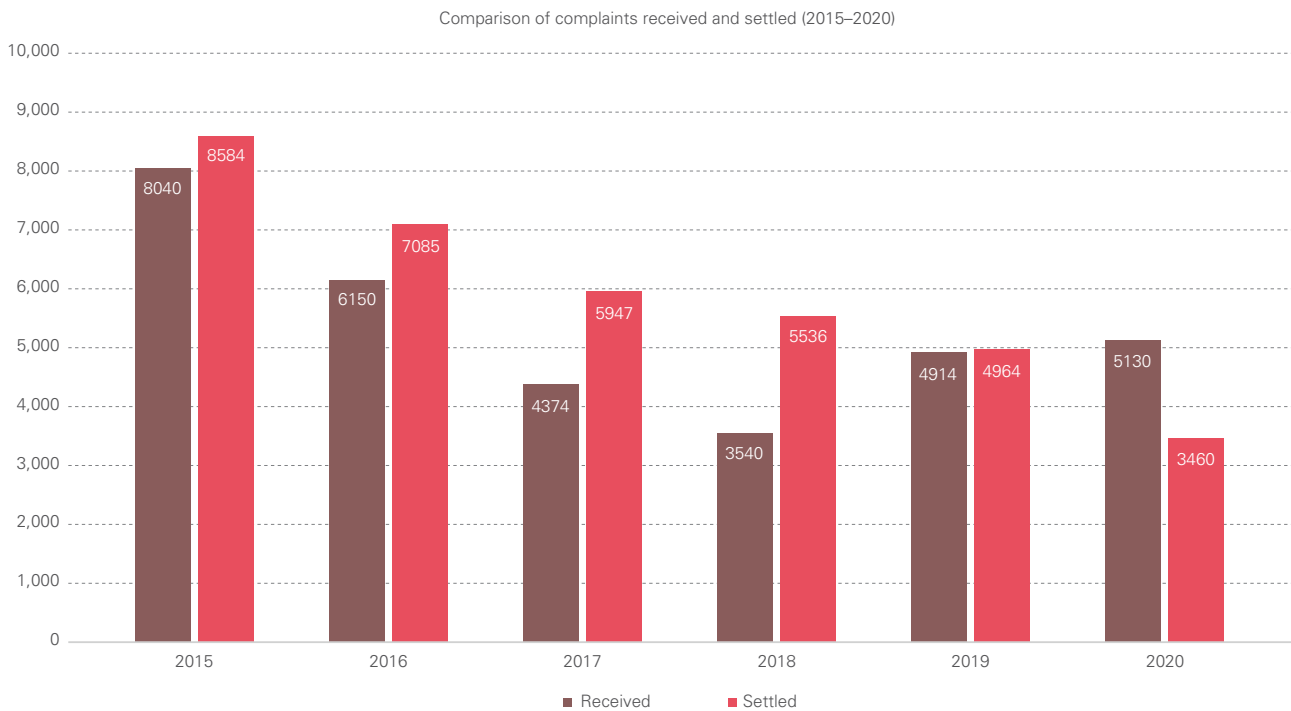
**Figure 5: Nature of complaints that the SLBFE received (2015–2020)<sup>132</sup>**



### Key observations from the SLBFE statistics for 2020 in relation to the nature of complaints<sup>133</sup>

- Although complaints show a gradual decline in relation to breach of the employment contract, it is still the most common form of complaint received in all years except 2020, where illness appears to be the common complaint.
- In 2020, the unprecedented circumstances owing to the COVID-19 pandemic significantly affected the migrant workers.<sup>134</sup> Hence, the figures from 2020 may not provide an effective comparison due to: (i) the exceptional circumstances related to COVID-19 and (ii) the possibility of the recorded information not reflecting the actual number of cases due to the gaps in data collection (See section 3.8).
- The category of illness has also gradually declined over the years, but it was still the second highest complaint in 2019.<sup>135</sup>
- In 2020, workers who migrated to Kuwait, Saudi, Oman and the UAE reported the highest number of complaints. Workers in the domestic housekeeping assistant category from each of these countries reported 1,192, 1,036, 347 and 285 complaints, respectively. Complaints received from these countries in respect of other work categories were also relatively high in comparison to other destinations.



Figure 6: Comparison of complaints received and settled (2015–2020)<sup>136</sup>

It is important to address the grievances of migrant workers in order to advance principles of accountability. Having an effective dispute resolution mechanism can assist the parties to resolve their conflict instead of using the court system. Conciliation, mediation and arbitration are some of the popular alternative dispute resolution mechanisms largely in practice. Fair recruitment principles prioritises free or affordable dispute resolution mechanisms for workers to have a valid claim when there is an alleged abuse of their rights.<sup>137</sup> As such, identifying and addressing the gaps in the existing complaint procedure will facilitate the migrant workers to alleviate their grievances and in theory prevent future abuses.

#### Key observations on SLBFE statistics for 2020 in relation to complaints received and settled<sup>138</sup>

- From 2015 to 2018, the number of complaints resolved by the SLBFE appears to be higher than the

complaints received. However, it is difficult to draw conclusions purely based on these numbers as the SLBFE does not provide more detailed data points on the nature of the complaints resolved or how many of the resolved cases in a given year belonged to complaints made in previous years.

- In relation to complaints for 2020, the recorded number may not reflect the actual number of cases as the SLBFE statistics only indicate provisional figures for that year on its official website.
- Additionally, the report published by the SLBFE for 2020 also notes the amount paid as compensation to workers: The compensation received by migrant workers for various violations of the employment contracts on complaints made has exceeded LKR 10 million from 2015 to 2019. The provisional figures published by the SLBFE indicate the amount of compensation paid during 2020 as LKR 4,090,122/-.

### 3.5. ISSUES IN THE COMPLAINT-HANDLING PROCESS

**Ineffective handling of non-monetary complaints:** The KIs show that if a complaint is made during the employment period while the migrant worker is overseas, the usual remedy provided to the migrant for non-payment of wages or violation of the employment contract by the employer is the opportunity to change the employer. However, it is uncertain how effective this conciliation process is in terms of solving the issue, specifically complaints of a non-monetary nature, to prevent repetition in the future. For instance, if the complaint is related to wages, the KIs show that the migrant worker is paid back wages through a conciliation process between the local agent and the foreign employer/agent. Since the worker is immediately transferred to another employer, the dispute is often resolved through negotiation or easy settlement rather than addressing the real cause or reason behind an issue.

The conciliatory role played by the licensed agent should be highlighted at this juncture. To resolve a dispute, it is important that the mediator be impartial and unbiased to ensure none of the parties involved in the dispute is prejudiced. However, the ILO notes that it could be problematic for licensed agencies to be in a mediatory position; as licensed agents are rarely skilled at mediating a dispute. More importantly, agents are unsuited to play the negotiating role because they are usually paid by the foreign employer or the foreign agent and, therefore, are not a neutral party.<sup>139</sup> As such, migrant workers' issues or grievances can mostly go unheard when the licensed agents are predominantly involved in the dispute resolution process.

However, the SLBFE Act does authorise the SLBFE to issue a direction to the licensed agency to facilitate the dispute when resolving complaints.

Section 44 of the SLBFE Act provides the following;

*Where the SLBFE receives a complaint that the employer has not complied with any conditions in the contract of employment, or that the licensed agent*

*has failed to take steps to ensure that the employer observes the conditions of the job agreement, the SLBFE must, after an inquiry, make an award directing the licensee to pay such person such sum of money as may be determined by him to be sufficient to defray the cost of unpaid wages, payments in lieu of holiday, leave and terminal benefits due to such person and other expenses ....., incurred by such person as a result of the breach of those conditions by the employer.*

Given this provision, one can interpret that the principal purpose of handing a complaint is to settle the payments owed to the migrant worker. The 2021 Trafficking in Persons, Sri Lanka report also noted that the majority of the complaints by migrant workers were handled by the SLBFE without handing over such cases to the Criminal Investigation Department (CID) for further prosecution.<sup>140</sup> As such, the authorities seem to neglect to resolve disputes and/or hold employers accountable to avoid similar situations arising in the future. Hence, even though at the end of the SLBFE inquiry the employer is compelled to settle the amount to the worker in accordance with the job agreement, such payment may not be punitive or compensatory. In such a context, the authorities seem to have limited motivation to further investigate or hold the employer accountable for violation of the contract terms. Accordingly, the formulation of policies and regulations imposing responsibility on the employer for the provision of employment facilities such as sufficient medical care in sickness and access to food and sanitation facilities is important to ensure that migrant workers' basic labour conditions are met. Imposing reparatory actions for complaints that deal with non-monetary matters will therefore effectively reduce the grievances of migrant workers.

**Violations handled according to a correctional system:**

For violation of any provision in the SLBFE Act, licensed agents are usually penalised in the form of a 'correctional system'.<sup>141</sup> For instance, charging a fee that exceeds the amount permitted by law to the migrant worker is a common complaint about licensed agencies.<sup>142</sup> When

a licensed agency has been found guilty of charging an excessive fee to migrant workers during recruitment, the SLBFE has the power to cancel the license under section 31 of the SLBFE Act. However, before cancelling the license, the SLBFE usually directs the agency to first settle the excess amount charged. The agency may be suspended from any further job recruitments until the violation is rectified (until settlement of that amount).<sup>143</sup> However, the interviewees noted that the probability of cancelling an agency's license is low and, usually, when the excess fee is paid back to the complainant, the suspension on the licensed agency is lifted. While this method affords some sort of retribution to the licensed agents, it does not necessarily favour the migrant workers when the latter may have been subjected to similar unscrupulous activities by the agent before. Nor does it serve the purpose of preempting such agency from committing similar wrongdoing in the future again.

**Insufficient institutional coherence:** The complaint response mechanism includes multiple institutions

that lack coordination and coherence. The KIIs have indicated the absence of coherence among institutions in terms of handling complaints as a cause for delay. Lack of coordination among the officers of the destination country and Sri Lanka – such as the foreign missions, the consular divisions, the embassy officers and the SLBFE officers – prolong the process of complaint resolution.<sup>144</sup> The lack of a structured process that sets out a framework to follow when a complaint or a plea is received results in delays.<sup>145</sup> In the absence of a set procedure, the institutions are at liberty to follow an ad-hoc procedure rather than a well-coordinated uniform approach to swiftly resolve the dispute.<sup>146</sup> Previously, foreign missions have often been the subject of various criticisms from several quarters about handling complaints: These complaints include poor coordination with the host country and Sri Lankan officers, lethargic attitude, lack of adequate staff and constraints of resources.<sup>147</sup> However, only a few of these allegations were highlighted as criticisms during the KIIs for this research.<sup>148</sup>

### 3.6. DIFFICULTIES IN LAW ENFORCEMENT

These difficulties are in relation to enforcing the law against the offender who is usually in another jurisdiction.

**i. Differences in legal systems:** One of the main challenges in cross-border dispute resolution is the differences in the legal systems between Sri Lanka and the country in which the migrant is employed. Conflicts of laws, differences in processing complaints by administrative bodies and differences in the governance structure in the destination countries often become impediments to efficient dispute resolution.<sup>149</sup> Some of these differences can be eliminated if both countries are a party to a related international convention, as the conventions usually obligate the signatories to assist in dispute resolution. However, Table 6 below provides a list of key international conventions that promote fair recruitment practices and indicates which conventions are ratified by Sri Lanka.<sup>150</sup> Table 6 simultaneously

indicates the ratification status of the top five countries of destination (CoDs) for Sri Lankan migrant workers.<sup>151</sup> A majority of the CoDs have not ratified most of the key conventions that protect and uphold the rights of migrant workers. The non-ratification by CoDs hinders migrant workers who are victims of abuse from being heard and participating in a meaningful and amicable dispute resolution mechanism.

**ii. Contracts governed by foreign law:** Ratification of international instruments alone is not sufficient. The KIIs revealed that individual employment contracts between the employer and the migrant workers are often governed by the law of the employer (this may be the employer's laws or the law of the destination country). In such an event, the migrant workers are governed by the law of the contract of employment as the contract is performed in the CoD. When the migrant workers

are subjected to a contract governed by a foreign law, which they are unfamiliar with, it creates confusion and vulnerability in the event of a dispute. Some Gulf countries do not have labour legislation pertaining to domestic workers. In such cases, dispute resolution is entirely subject to the contract of employment.<sup>152</sup> Moreover, the KILs indicated that some individual employment contracts are designed to take precedence over bilateral agreements between the two governments. Issues of this nature hinder the protection (such as the provision of legal assistance/advice from Sri Lanka) offered to migrant workers through diplomatic missions. More importantly, enforcing the law against the employer is difficult as the enforcement of contractual obligations is then subject to a civil suit in a court of law in the CoD. This is an unlikely course of action, due to most migrant workers lacking legal or financial assistance.<sup>153</sup> It is noted that even the foreign missions lack financial and legal resources to pursue grievances faced by migrant workers.<sup>154</sup>

- iii. **Double contracting system:** Practices such as ‘double contracting’ also prevent migrant workers from pursuing any legal action against the employer.<sup>155</sup> Double contracting is often found in Middle Eastern countries where migrant workers are subjected to two contracts, one signed locally in Sri Lanka and the other signed abroad in the CoD.<sup>156</sup> Often the contract signed abroad takes precedence and is less favourable towards the migrant worker. ILO refers to two examples where the workers had been promised by the local agent different working conditions to that of the actual contract the employer offers in the CoD, which resulted in workers having to return without a job.<sup>157</sup> As such, migrant workers are often rendered vulnerable in the event of a dispute.
- iv. **Enforcement of law against employers/foreign agents:** Exercising the law against the employers

is a critical issue raised by government officials during the KILs due to the difficulty of gathering evidence. Presenting or gathering evidence to prove an offence in a court of law is increasingly difficult for domestic migrant workers, especially in criminal matters. This is largely because their work occurs within a private household, in a completely employer-controlled environment. The difficulty is even more severe in a Kafala system, where the employer sponsors the domestic worker and has stringent controls over them. In this system, the latter cannot leave the employer until the contract expires.<sup>158</sup> The KILs with the SLBFE revealed that in most forced labour or labour exploitation cases, it was difficult to establish deception and coercion.<sup>159</sup> Therefore, the difficulties in proving the elements of the crime have skewed the possibilities of migrant workers seeking redress.

- v. **Problems associated with the litigation process:** The 2021 Trafficking in Persons for Sri Lanka Report notes that the lack of assistance provided to potential victims, delays in the court procedure, lack of knowledge and funding for victims of forced labour and lenient sentences pronounced by the Sri Lankan Courts against offenders of trafficking have discouraged victims of forced labour from coming forward to seek justice.<sup>160</sup> Domestic workers, who are among the most vulnerable sectors of all migrant workers in the Gulf countries, face problems such as precarious immigration status during the pendency of the litigation process and the lack of financial and legal assistance while in the foreign country.<sup>161</sup> The KILs with SLBFE officials intimated that in cases of forced labour, due to the financial vulnerability and the difficulty of pursuing a court procedure, most workers settle for the convenient option of changing the employer. The ILO also notes that because of the lengthy and costly litigation process, the possibility of workers pursuing litigation is limited as it prevents them from re-migrating.<sup>162</sup>

**Table 6: International instruments on fair recruitment and labour standards – Ratification status**

International instruments	Ratification status					
	Sri Lanka	Saudi Arabia	Qatar	UAE	Kuwait	Oman
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	Ratified	Not ratified	Not ratified	Not ratified	Not ratified	Not ratified
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, 2000	Ratified	Ratified	Ratified	Ratified	Ratified	Ratified
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime, 2000	Convention signed**	Ratified	Not ratified	Not ratified	Ratified	Ratified
Protocol of 2014 to the Forced Labour Convention, 1930	Ratified	Ratified*	Not ratified	Not ratified	Not ratified	Not ratified
Forced Labour Convention, 1930 (No. 29)	Ratified	Ratified	Ratified	Ratified	Ratified	Ratified
Migration for Employment Convention (Revised), 1949 (No. 97)	Not ratified	Not ratified	Not ratified	Not ratified	Not ratified	Not ratified
Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)	Not ratified	Not ratified	Not ratified	Not ratified	Not ratified	Not ratified
Private Employment Agencies Convention, 1997 (No. 181)	Not ratified	Not ratified	Not ratified	Not ratified	Not ratified	Not ratified
Domestic Workers Convention, 2011 (No. 189)	Not ratified	Not ratified	Not ratified	Not ratified	Not ratified	Not ratified

\*Saudi Arabia – Protocol of 2014 to the Forced Labour Convention 1930 in force from 26 May 2021.

\*\*Sri Lanka – Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime 2000, signed but yet to be ratified.

### 3.7. ANCILLARY CHALLENGES RELATING TO RESOLVING DISPUTES

This section briefly sets out some of the ancillary challenges faced by migrant workers during the process of resolving disputes and in filing complaints. These issues can be identified as additional challenges workers come across when attempting to resolve disputes.

#### i. Language difference

Language difficulty can hinder effective communication of information, facts and experiences of the migrant worker with foreign employers.<sup>163</sup>

This is often the situation with administrative authorities, too. ILO identifies that the language skills and the ability of officers in consular divisions and foreign missions to coordinate issues with local officers in CoDs are poor.<sup>164</sup> This type of issue unnecessarily elongates the dispute resolution process.<sup>165</sup> Accordingly, during the KIIs, workers expressed to the team dissatisfaction at the absence of interpreters or translators to effectively communicate their grievances at local police stations at CoDs.<sup>166</sup>

## ii. Repatriation costs

According to interviewees, repatriation is the last resort for a migrant worker to find redress in the dispute resolution procedure. It was intimated that most of the workers who opt to return due to a dispute that arose during their employment do not have the financial means to bear the cost of the air ticket.<sup>167</sup> According to the SLBFE Act, in the event the complaint made to the SLBFE by the migrant worker is proven, the SLBFE has the power to make an award directing the local agency to pay such person due money and other expenses including the cost of passage to Sri Lanka.<sup>168</sup> Although the regulatory provision is such, Verite's survey data suggests that more than 50% of migrant workers who decided to return to Sri Lanka before the expiration of the contract had to bear the costs of the air ticket to return to Sri Lanka.<sup>169</sup>

## iii. Unlicensed sub-agents

Sub-agents often operate from rural areas and have increasingly become more involved in recruiting migrant workers.<sup>170</sup> Most of the licensed agents in Sri Lanka are based in the main commercial districts of Sri Lanka such as Colombo, Gampaha and Kurunegala.<sup>171</sup> Therefore, to recruit migrant workers from other districts and cities, licensed recruitment agencies rely on sub-agents to visit towns and villages to inform and convince potential workers of employment opportunities overseas.<sup>172</sup> Additionally, the SLBFE license precludes licensed recruitment agencies from operating from more than one location.<sup>173</sup> This geographical limitation means that agencies are heavily reliant on sub-agents' assistance in recruiting migrant workers.<sup>174</sup>

However, in many instances, subagents also engage in exploitative and fraudulent recruitment practices such as forging documents, falsifying information, and misrepresenting the nature of the employment overseas.<sup>175</sup> KILs with migrant returnees noted that sub-agents are often the first point of contact with female migrant workers from rural parts of Sri Lanka

intending to go for foreign domestic employment. They are known for targeting potential migrant workers using deceptive tactics, such as "placing themselves as a confidant".<sup>176</sup> As such, it is also reported that potential migrant workers rely heavily on the sub-agents to take care of all aspects of migration.<sup>177</sup> As most first-time migrant workers are unaware of the registration requirements with SLBFE, they can be susceptible to misinformation and can easily be manipulated by sub-agents.

The undocumented and unofficial status of most of these sub-agents further intensify issues.<sup>178</sup> They often function in an informal capacity as a facilitator or a broker who supplies potential workers to the licensed agents.<sup>179</sup> Studies identify instances where sub-agents have also cheated the licensed agents.<sup>180</sup> The International Organisation for Migration (IOM) stipulates that the informality attached to sub-agents' work makes it difficult even for licensed agents to monitor sub-agents.<sup>181</sup> Under the SLBFE Act, sub-agents are unregulated. Therefore, sub-agents have no legal requirement to register or maintain a license, nor do they generally maintain a formal contract with any licensed agency.<sup>182</sup> As such, they easily escape the regulatory eye of the SLBFE.<sup>183</sup>

## iv. Lack of support for workers who migrated without SLBFE registration

The SLBFE website specifically mentions that the existing system of filing complaints is only available for workers who have registered with the SLBFE.<sup>184</sup> The SLBFE does not extend its assistance to migrant workers who did not choose employment without SLBFE registration.<sup>185</sup> As such, the workers who have left for employment without SLBFE registration have to find other means of help such as contacting the relevant embassy or the consular division.<sup>186</sup> This is problematic since the embassy or consular divisions, as diplomatic institutions, have various other objectives and duties.<sup>187</sup> Some foreign embassies of Sri Lanka are grappling with difficulties such as lack of staff and poor coordination with host country officials.<sup>188</sup> Hence, foreign missions and consular

divisions may find it difficult to immediately provide any relief to migrant workers.

Moreover, the refusal to offer SLBFE protection to workers without SLBFE registration can increase the risks of danger and vulnerabilities a potential victim of trafficking encounters.<sup>189</sup> As such, there is a substantial lack of a safety net for migrant workers who choose irregular means of migration.<sup>190</sup> This aspect is specifically not in compliance with ILO GPOG.

The ILO GPOG Principle 13 states that workers, irrespective of their presence or legal status in a state, should have access to free or affordable grievance and other dispute resolution mechanisms in cases of alleged abuse of their rights in the recruitment process, and effective and appropriate remedies should be provided where abuse has occurred. As such, the GPOG appears to impose the responsibility of all workers, regardless of their status, on the state by giving them access to free and fair dispute

resolution.

During KIIs, it was indicated to the team that complaints of workers who have a limited understanding of migration and/or foreign employment and have migrated without SLBFE registration are not received with sufficient gravity or attention by the SLBFE.<sup>191</sup> The workers noted that sometimes the unregistered migrant workers' complaints or grievances were denied.<sup>192</sup>

The KIIs also revealed that the workers who migrate without SLBFE registration are often the ones who were left stranded in the CoDs during crises. For example, during KIIs with the SLBFE, it was revealed that a majority of workers who faced difficulties in finding shelters during the COVID-19 pandemic were the ones without SLBFE registration.<sup>193</sup> Therefore, crises appear to put unregistered migrants in a more precarious position.

### 3.8. COVID-19 RELATED ISSUES

This section highlights the difficulties faced by migrant workers specifically due to the COVID-19 pandemic during the dispute resolution procedure.

**Non-investigation of forced labour disputes and lack of mechanisms to derive information:** In relation to handling complaints, the SLBFE reportedly facilitated complaints from migrant workers through an online portal to assist in issues such as violations of the contract of employment, non-payment of wages and unlawful document retention by the employer.<sup>194</sup> It is also reported that SLBFE officers have only managed to conciliate disputes administratively, i.e., without prosecuting such offences for potential trafficking incidents.<sup>195</sup> Moreover, although thousands of migrant workers who were stranded in CoDs were later repatriated to Sri Lanka during the pandemic, it is reported that the returning workers had not been segregated to specifically identify victims of forced labour.<sup>196</sup> The KIIs with SLBFE officials also revealed that the authorities have not further investigated most

of the issues relating to non-payment of wages and the premature termination of contracts due to the pandemic. A specific reason for this was not provided. However, the officers indicated that when the economic situation gradually improved in the CoDs as the pandemic subsided, they learnt that most migrant workers either have remigrated or did not want to pursue the complaint further.<sup>197</sup>

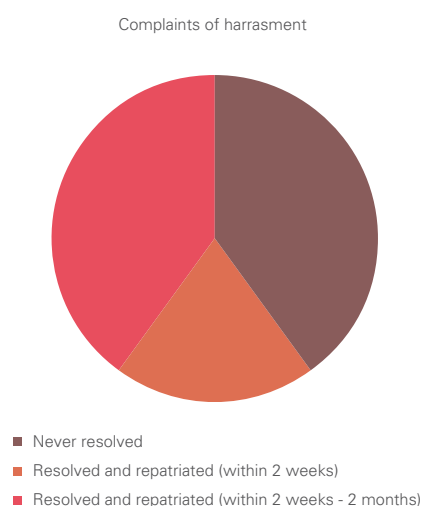
**Delays in litigation aspects:** The pandemic has also affected the migrant workers who had pending court proceedings. The 2021 TIP Report states that the court hearings relating to TIP were prolonged due to the pandemic-related lockdowns.<sup>198</sup> It is reported that investigations into potential forced labour issues were stalled due to investigation officers being infected with COVID-19.<sup>199</sup> Hence, it is uncertain how far the impacts of delayed investigations or prosecutions have jeopardised the plight of victims of trafficking and forced labour.

### 3.9. ANALYSIS OF VERITÉ SURVEY DATA

This section briefly discusses several important aspects derived from the data gathered during the Verité study of migrant workers.

- a. Of 110 migrant workers interviewed by Verite, only 13 per cent faced problems while overseas.
- b. Of the said 13 per cent, only 14 of the respondents had, in fact, filed a complaint either directly or through their family member. Out of these 14 migrant workers interviewed,
  - Three complaints directly related to sexual harassment (See Figure 7)
  - Two complaints mentioned harassment as a secondary cause (See Figure 7)
  - Six cases reported non-payment of wages as the main reason
  - One case reported the complainant being stranded without employment.

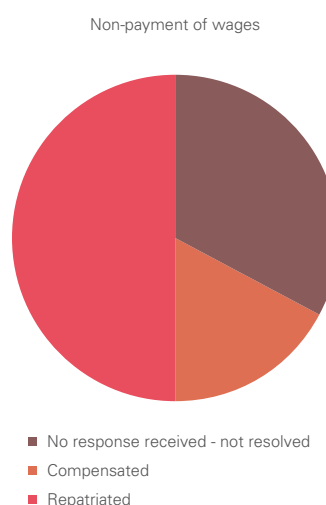
Figure 7: Complaints of Harassment



- Two of five cases of harassment did not receive a response and were never resolved.

- One complainant received a response within two weeks and was repatriated.
- Two complainants received a response between two weeks to two months were also repatriated.

Figure 8: Non-payment of wages



- Two of six cases of non-payment of wages received no response from authorities – not resolved (Figure 8)
  - Four of the six were resolved – one compensated, three repatriated
- c. 64 per cent of the migrants who returned before the expiration of the employment contract have filed a formal complaint.
  - d. 40 per cent of the local agencies interviewed indicated that they usually respond to complaints from workers within 3 days, whereas 28 per cent of agencies indicated that they respond to queries within 24 hours.
  - e. An overall analysis of data suggests the following:

Existence of a mechanism: a state-managed/overseen formal complaint filing system is available for migrant workers.



Accessibility/affordability: 64 per cent of prematurely returned migrant workers filing a formal complaint indicates that the workers have reasonable access to the complaint filing system.

Efficiency: considering that more than 60 per cent of agencies respond to queries within 24 hours to 3 days, it could be reasonably inferred that the agencies are attentive and fairly efficient in handling workers' complaints.

Effectiveness: the effectiveness of the existing complaint system, however, is inconclusive in

safeguarding the worker or alleviating the workers' issues. Sufficient data is not available to suggest that the repatriated workers actually received a satisfactory solution to their complaint after their return. Also, out of the 14 cases where a complaint had been filed, only 4 were reported as unresolved. Therefore, it appears that a majority of cases had received some outcome through the complaint mechanism. However, due to the small sample size, it is difficult to conclusively determine the overall situation and success rate of the complaint mechanism.

### 3.10. SUMMARY OF ISSUES UNDER PRINCIPLE 13

- a. Inability to enforce the law against the employer: The foreign employers are rarely held accountable for violating the contract of employment. Reasons for this include the local agent being the primary mediator negotiating for settlement of disputes, employers hesitating to co-operate during the inquiry, and the lack of evidence to establish forced labour cases in court.
- b. Lenient enforcement of the law against the licensed agents: Licenses of the agents are cancelled only as a last resort and the licensed agents only receive a suspension of the license until the worker is paid back for the losses suffered.
- c. Issues faced by victims during the litigation process: Entrenched delays in the justice sector, lenient sentences issued to TIP offenders and a lack of financial assistance offered to victims of forced labour to pursue litigation can discourage victims from pursuing dispute resolution through courts, thus limiting their fair and speedy access to justice.
- d. Difficulty in enforcing the law: The differences in the legal systems of the CoD and Sri Lanka are a significant hindrance to the enforcement of the law against the foreign employer or foreign agent. Issues of double contracting, employment contracts being subject to foreign laws and the CoD's non-ratification of international conventions are significant barriers to enforcing the law against the foreign employer.
- e. Barriers to access: Migrant workers encounter ancillary issues that further complicate the dispute resolution process. For example, language difficulties make it challenging for workers to understand the dispute resolution process. Further, issues such as the cost of repatriation falling upon the victim and the inability to pursue litigation in the CoD due to the precarious immigration status of the worker are ancillary difficulties that can hinder access to filing a formal complaint and following through.

### 3.11. RECOMMENDATIONS

1. **Formulation of regulations under SLBFE Act** – A regulatory framework that lays down the dispute resolution mechanism will be beneficial in several aspects: the framework could encompass a step-by-step process that provides each institution with a clear guide on how to handle complaints and who the key point person of each institution is for coordination. It can identify who has the key responsibility in handling all complaints received until they are resolved. Regulations will minimise the agents' role or involvement in mediating a premature settlement between the employer and worker without solving the issue.

#### Regional best practices:

- a. The Philippines Department of Labour and Employment introduced the "Manual of Procedures in Handling Complaints on Trafficking in Persons, Illegal Recruitment and Child Labour". This serves as a standard procedure for the authorities to use while carrying out duties in accordance with laws such as the Migrant workers and Overseas Filipinos Act and the Anti-Trafficking in Persons Act.<sup>200</sup> The manual aims to facilitate the effective management of TIP cases and promote coordinated efforts in effective identification and prosecution of the perpetrators.<sup>201</sup>
- b. Meanwhile, Cambodia also has introduced a guideline for dispute resolution. The 'Guideline on dispute resolution of migrant workers' is a guidance system for stakeholders such as Cambodian labour officials, Migrant Worker Resource Centre staff and service providers to use in support of their migrant workers.<sup>202</sup> The Guidelines include definitions and implementation principles that should be adhered to throughout the dispute resolution process.<sup>203</sup>

#### Box Item 3: Cambodian Guideline on Dispute Resolution of migrant workers

##### BOX ITEM #3

Cambodian Guideline on dispute resolution of migrant workers carries principles similar to the GPOG. It stipulates a step-by-step process to facilitate complaints by migrant workers, from a right-based, transparent, and timely responses and gender-sensitive point of view.

The Cambodian Guideline<sup>204</sup> mainly facilitates three aspects: (i) complaints can be filed at any time during the migration process, even after return; (ii) availability of assistance, legal and general, to help the process; and (iii) the process to resolve the complaints. The absence of a protocol creates confusion among officers who are handling complaints and increases transaction costs. Therefore, a guidance mechanism would increase reliability, transparency and efficiency in dispute resolution. As such, Sri Lanka can develop a similar model to develop a protocol or guideline that officials can follow.

2. **Inter-state coordination** – Sri Lanka can initiate efforts to expeditiously resolve disputes through improved coordination among inter-state officials and strengthening bilateral ties while making dispute resolution procedures transparent. Transparency will increase the visibility of the progress to outsiders and this will improve migrant workers' confidence in the justice system. Moreover, formulating help desks that disseminate information and introducing local inspection mechanisms to enforce the law against non-cooperative employers will minimise difficulties in enforcing the law. Regional participation efforts could be encouraged among the South Asian countries, similar to the ILO TRIANGLE in the ASEAN programme used by South-East Asian countries.<sup>205</sup> Regional efforts will enhance cooperation among

countries to collectively: identify common disputes faced by migrant workers, and provide coordinated solutions to issues faced by migrant workers in the South Asian region.

3. **Training and competence development** – Adequate and robust pre-departure training courses must be developed that contain a more comprehensive curriculum in terms of developing professional skills and language abilities.<sup>206</sup> 63 per cent of migrant workers who participated in the Verité study stated that better departure training could produce better results in lowering complaints.<sup>207</sup> Furthermore, 66 per cent of migrant workers also stated that better communications with the employer and agency can contribute to reducing the number of disputes. As such, language abilities will be beneficial in improving communications.

In relation to training and building skills, Sri Lanka can accede to a universally accepted competence standard that will be useful in assessing the levels of competence of workers. This will be specifically advantageous to sectors such as domestic work, where the required level of competence is

uncertain.<sup>208</sup> Competence standards will also help reduce disparities and mismatches of employer expectations. Sri Lanka can adopt the Regional Model Competency Standards (RMCSs) as a best practice. The RMCSs are formulated with the cooperation stakeholders from Bangladesh, Cambodia, Hong Kong (China), India, Indonesia, the Philippines, Singapore and Thailand. This is a template that can be used as an adaptive tool consisting of six functions related to domestic work.<sup>209</sup> If Sri Lanka can adopt a similar international standard to assess the competence levels of migrant workers, it will create better opportunities for workers to improve their employability and professionalism.

4. **Centralised database to track disputes** – A database that disseminates detailed information of the cases received, the mode of resolution of the complaint, the type of remedies offered and the duration of the dispute resolution procedure will increase transparency and efficiency of dispute resolution. It will also enable the stakeholders to understand and evaluate the progress of dispute resolution and suggest ways to improve efficiency in handling complaints.<sup>210</sup>

# CHAPTER 4:

## ILO General Principle 6 – Recruitment across borders in accordance with Human Rights

This section will analyse Sri Lanka's legal and policy framework in terms of ILO General Principle 6, to see how far Sri Lanka has come in terms of protecting the human rights of migrant workers in the recruitment process. It will first lay down the principles and guidelines underlying ILO

GPOG Principle 6. It will then lay out key international instruments applicable to Sri Lanka in relation to the protection of migrant workers' rights. Lastly, it will discuss the current context in Sri Lanka in protecting the human rights of migrant workers in comparison to ILO GPOG.

### **4.1. DEFINITION - ILO GENERAL PRINCIPLE 6**

ILO General Principle 6 requires that recruiting workers across borders should be done in accordance with the relevant national laws, regulations, employment contracts and applicable collective agreements of countries of origin, while also upholding international human rights including fundamental rights and international labour standards.<sup>211</sup> The General Principles recognise that laws and standards in terms of rights at work reduce abuses at the recruitment stage and should therefore be strictly implemented.

The ILO Review of Law and Policy of Migrant Workers<sup>212</sup> notes that Sri Lankan workers' rights are less likely to be protected in the current context. This is because Sri Lanka is primarily a country of origin for migrant workers and the host countries mostly do not have better protection systems than origin countries for migrant workers' rights.<sup>213</sup> The key destination countries for Sri Lankan workers, being mostly Gulf countries, have not ratified most conventions that uphold international

labour standards and human rights. As such, ILO notes that workers' rights such as freedom of association, fair trial and freedom from inhuman and degrading treatment can face serious degradation in the absence of a proper mechanism to enforce these rights across borders.<sup>214</sup>

The ILO Operational Guidelines provide certain measures that can be adopted by different stakeholders such as governments, labour recruiters and employers.<sup>215</sup> These are described below.

#### **State responsibility**

The Operational Guidelines recognise the state as the ultimate bearer of responsibility in advancing fair recruitment and reducing abusive labour practices. As such, the government is obliged to respect, protect and fulfil the internationally recognised human rights of its migrant workers including fundamental principles in the recruitment process.<sup>216</sup> The state is also vested with the

responsibility of ensuring that legislation is implemented covering all stages of the recruitment process, including information dissemination, selection, placement and return to the country.<sup>217</sup>

The Operational Guidelines also provide that the state should ensure that bilateral and multilateral agreements are consistent with international human rights standards and labour standards.<sup>218</sup> The state also has the responsibility to ensure international coordination and cooperation across common labour migration corridors.<sup>219</sup> Moreover, bilateral agreements should be drafted, adopted, reviewed and implemented with meaningful participation of all stakeholders backed with regular oversight. The states have to take steps to inform the migrant workers of such bilateral agreements.<sup>220</sup>

### Employment agencies

The Operational Guidelines state that the recruitments should be carried out with due consideration of human

rights, independent of the abilities and/or willingness of governments or state authorities to fulfil their obligations.<sup>221</sup> The recruitment agencies are undertaking the responsibility of due diligence regarding their recruitment activities to safeguard the rights of migrant workers.<sup>222</sup> Recruiters across borders are also required to adhere to applicable national laws, regulations and collective agreements that protect workers and respect workers' rights in line with bilateral and multilateral agreements under which recruitments are carried out.<sup>223</sup>

### Employers

As per the Operation Guidelines, employers should take steps to provide migrant workers with employment contracts that are clear, transparent and in a language that the migrant worker understands.<sup>224</sup> According to the guidelines, the employers must also ensure that migrant workers are not forced or deceived into signing any employment contracts and that employers should only obtain informed consent.<sup>225</sup>

## 4.2. KEY INTERNATIONAL INSTRUMENTS FOR PROTECTING MIGRANT WORKERS' RIGHTS

Table 7 : Key international instruments for protecting migrant workers' rights

International instrument ratified by Sri Lanka	Salient provisions
C097 – Migration for Employment Convention (Revised), 1949 (No. 97)	Article 6: Each member for which this convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its nationals.
C143 – Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)	Article 1: Each member undertakes to respect the basic human rights of all migrant workers. Article 9: Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter the national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.
C181 – Private Employment Agencies Convention, 1997 (No. 181)	Article 4: Measures shall be taken to ensure that the workers recruited by private employment agencies providing the services are not denied the right to freedom of association and the right to bargain collectively.

<p>International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>226</sup> (CMW)</p>	<p>Article 7: State parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.</p> <p>Article 10: No migrant worker or member of his or her family shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.</p> <p>Article 11 (2): No migrant worker or member of his or her family shall be required to perform forced or compulsory labour.</p> <p>Article 12:</p> <ol style="list-style-type: none"> <li>1. Migrant workers and members of their families shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of their choice and freedom either individually or in community with others and public or private to manifest their religion or belief in worship, observance, practice and teaching.</li> <li>2. Migrant workers and members of their families shall not be subject to coercion that would impair their freedom to have or to adopt a religion or belief of their choice.</li> </ol>
<p>Committee on the Elimination of All Forms of Discrimination against Women (CEDAW)</p>	<p>State parties condemn discrimination against women in all its forms, and agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.</p> <p>CEDAW General Recommendations No. 26 adopted in 2008 adds robust protection for women migrant workers by recognising that women migrant workers need protection throughout the migration process. Also, special recognition is given to the protection of women migrant workers who are undocumented or who are at risk of having their rights violated.<sup>227</sup></p>

### 4.3. SRI LANKAN CONTEXT

This section addresses in detail the issues in implementing Principle 6 such as employment contracts, compliance with international labour standards, bilateral agreements between governments and other rights-based issues faced by migrant workers.

Although Sri Lanka has made progress in recognising the human and labour rights of migrant workers in the past few years, workers still experience challenges in enjoying their rights due to discriminatory treatment, harassment, non-payment of wages, long hours of work and uninhabitable living conditions.<sup>228</sup> Generally, Sri Lanka lacks comprehensive legislation that protects and enhances the rights of workers in instances of unfair dismissal, non-payment of wages and discriminatory requirements at the recruitment stage such as the Family Background Report (FBR).<sup>229</sup> These aspects have also been recognised by the CMW in its concluding observations on Sri Lanka in 2016.<sup>230</sup>

As Sri Lanka follows a dualistic approach, the ratification of international conventions is limited until national legislation is enabled to enforce such provisions. In the absence of protective legislation that safeguards and upholds migrant worker rights, labour standards and rights of migrant workers, the workers' rights are currently ensured mostly through individual employment contracts and bilateral agreements between the state of employment (CoD) and Sri Lanka.

#### i. Individual contracts of employment

This section discusses the importance of individual contracts of employment and the issues currently faced by migrant workers in enforcing the contracts.

In the absence of legislation that protects workers in the CoD, individual employment contracts play a vital role in ensuring employers adhere to the terms and conditions

therein. Therefore, including provisions that compel the employers to uphold the rights of the worker and labour standards within the employment contracts is essential.

According to the SLBFE Act, one objective of the SLBFE is to enter into agreements with foreign authorities, employers and employment agencies to formalise recruitment agreements.<sup>231</sup> The SLBFE is therefore vested with the primary responsibility in ensuring that contractual terms in the agreements safeguard fair recruitment practices.

However, due to issues such as ‘double contracting’ (See section 3.6 (iii)), the degree of protection afforded to migrant workers in terms of human rights and labour rights is also unsatisfactory. Migrant workers often complain of multiple other issues about employment contracts, such as contracts being signed in a language foreign to the workers, arbitrary reductions of salary by the employer, lack of resting hours, confiscation of passport and other documents and the lack of contractual provisions protecting workers’ rights such as medical care.<sup>232</sup>

In theory, however, workers’ rights should be protected through the individual contractual provisions. But there are substantial barriers to enforcing these contracts that require regulatory oversight to protect the basic rights of migrant workers. These include double contracting issues, the difficulty of enforcing the law against the employer and the lack of support to the victim during the litigation process [see section 3.6 (i) for a detailed explanation].

## ii. **Bilateral agreements and individual contracts of employment**

This section discusses the various aspects of bilateral arrangements between governments, the importance of bilateral agreements in upholding and safeguarding labour rights of workers and the issues and gaps with regard to bilateral arrangements.

### **Importance of bilateral agreements in protecting rights of workers**

Sri Lanka has signed bilateral agreements with several CoDs about the recruitment of migrant workers including Bahrain, Jordan, Libya, UAE, Saudi Arabia, Korea, Iraq, Oman, Seychelles, Italy, Swiss, Qatar, Afghanistan and Kuwait.<sup>233</sup> The provisions in bilateral agreements generally govern matters such as a fair and well-informed recruitment process and the protection of workers’ labour rights.

The Ministry of Foreign Affairs in Sri Lanka is the treaty repository of all bilateral agreements Sri Lanka has signed with other countries. It is the principal entity that reviews the provisions in these agreements.

The KIIs revealed that bilateral agreements between countries afford overarching protection to migrant workers such as providing legal recognition in the foreign country; increased ability to cooperate with foreign consular divisions, foreign missions and embassies; and benefits arising through diplomatic relationships in relation to repatriation. Accordingly, some officials noted that migrant workers are better protected and secured in countries with which Sri Lanka has a signed bilateral agreement than in countries with which Sri Lanka does not have bilateral arrangements for employment.

#### Box item 4: Salient Provisions of the bilateral agreement between Sri Lanka and the State of Israel relating to employment

##### BOX ITEM #4

##### Salient provisions of the bilateral agreement between Sri Lanka and the State of Israel relating to employment

**Article 6:** *Recruitment Process* - States that the recruitment process should be transparent and shall be subject to the limits of fees prescribed by the national laws of Israel.

**Article 7:** *Joint Coordination Committee and exchange of information* - Stipulates that the parties, through the relevant cooperating authorities, should endeavour to exchange relevant information such as labour relations, criminal offences, entry, stay and obligations of the employer. The Article also states that the Joint Committee, comprising the representatives of both countries, shall be set up to solve problems arising in/ from the implementation of the agreement, and the committee shall meet annually.

**Article 12:** *Dispute resolution between employers and workers* - States that the resolution of disputes arising between employers and workers are 'subject to the exclusive jurisdiction of the Courts of the State of Israel, and [will] be resolved solely in accordance with applicable Israel law without regard to its choice of law rules'.

However, most bilateral agreements are not available for public inspection, ostensibly due to the confidentiality associated with the bilateral arrangements. Transparency and access to these bilateral arrangements can shed light on the rights protected under these agreements for a human rights-based assessment. The bilateral agreement between Sri Lanka and the State of Israel signed on February 24, 2020, was the only agreement available to the public at the time of writing this report.<sup>234</sup> Provisions salient in relation to this agreement include Articles 6, 7 and 12 and are highlighted in Box Item #4.

##### Key observations from the bilateral agreement between Sri Lanka and the State of Israel

- Article 12 vests exclusive jurisdictional authority to the State of Israel in relation to dispute resolution without regard to the choice of law. Clauses of this nature may be indicative of the lack of bargaining power of the origin country in relation to resolution of its migrant workers' disputes. Sri Lanka's lack of bargaining power as a source country in relation to the recruiting countries was also mentioned as a challenge during KIIs with officials.

- By eliminating alternative avenues to negotiate disputes between the parties, Article 12 has brought into question the true spirit of diplomacy that underlies the bilateral arrangements between the two countries.
- There is also no update as to what kind of joint efforts are carried out in practice under the Joint Committee referred to in Article 7.

##### iii. Issues relating to bilateral agreements and memorandums of understanding (MOUs)

###### a. Provisions are ineffective

Although Sri Lanka has entered into several bilateral arrangements with CoDs to enhance recruitment conditions, it has shown little effect.<sup>235</sup> Generally, in Sri Lanka, none of the parties to the agreements or MOUs show a keen interest in following the terms therein, other than setting up review meetings on an ad-hoc basis.<sup>236</sup>

However, the KIIs with state officials revealed that Sri Lankan diplomatic missions, wherever possible, insist



on including provisions within the bilateral agreements that ensure the protection of workers through individual employment contracts. It was also noted that some bilateral agreements do have provisions mandating the protection of workers' rights inserted in employment contracts such as working hours, resting hours, type of work required, inhabitable accommodation, payment methods, repatriation and compensation for a work injury. However, since these agreements are not available for public review, it is difficult to verify this information.

Additionally, the ILO Review of Law and Policy in SL reports that the provisions in MOUs or the bilateral agreements between Sri Lanka and CoDs have proven futile in enabling migrant workers to institute actions against employers who violate their contract of employment in the CoD.<sup>237</sup> This is mostly due to the worker's inability to enforce the contract in the CoD, either because the employer is not cooperating to resolve the dispute or contractual provisions render it difficult to pursue litigation.

#### **b. Extremely generic and ambiguous clauses**

There are instances where clauses within the MOUs are too generic, ambiguous or insufficient to extend protection to specific rights of migrant workers during the period of employment.<sup>238</sup> This was also articulated in the KIIs with state officials. It was intimated that bilateral agreements and MOUs between Sri Lanka and CoDs have only recently begun to include specific clauses that aim to protect migrant workers' individual employment rights, such as the right to a fair trial and the right to decent work conditions and working hours.<sup>239</sup> It was also indicated that most bilateral agreements are signed during diplomatic visits of country leaders. As such, the terms of the bilateral agreement are mostly negotiated in a way that

derives economic benefits to both parties. When bilateral ties are mostly built to prioritise economic benefits, it is doubtful how much non-economic values such as human rights and labour standards are incorporated within the agreements. As such, the CMW emphasises a pressing need for the state parties to actively promote ratification of international conventions that promote protection of workers' rights by CoDs.<sup>240</sup>

It is important to note the SLBFE's role in this regard. One of SLBFE's objectives includes the formulation and implementation of model contracts of employment that ensure fair wages and standards of employment.<sup>241</sup> Although the individual employment agreements should be approved by the SLBFE before departure, systems such as double contracting can easily override the protections afforded by the employment contract signed in Sri Lanka.<sup>242</sup> While KIIs did not reveal whether the bilateral agreements capture issues such as double contracting, it was noted that bilateral agreements only provide an overarching protection against exploitative labour practices. Therefore, specific and pressing issues in double contracting are often subject to interpretation of the parties and mostly overlooked by bilateral arrangements.

The Sri Lanka Shadow Report to the CEDAW also noted that current MOUs or bilateral agreements provide little protection to women migrant workers except protection provided under labour laws of the CoDs.<sup>243</sup> The report stated that MOUs often deal with labour law provisions that address payment delays and other employment issues. Therefore, the report emphasised that mechanisms that guarantee protections to 'migrant women seeking redress for exploitation, gender-based violence and abuse perpetrated by their employers remain extremely poor and need to be strengthened'.<sup>244</sup>

## 4.4. OTHER RIGHTS-BASED ISSUES FACED BY MIGRANT WORKERS

### a. Sri Lanka's reservations on safeguarding labour rights

In its concluding observations, the CMW has specifically expressed its concern over Sri Lanka's reservation on Article 54 of the International Convention on the Rights of Migrant Workers (ICRMW), which safeguards the rights of the worker against dismissal, remuneration, and period of employment.<sup>245</sup> The CWM identifies this as an impediment to the full enjoyment of the rights of the workers under the ICRMW.

### b. Ambiguities associated with repatriation of workers

There is a lack of clarity in terms of the legal framework involved in relation to repatriation of migrant workers who have unresolved visa statuses. The GPOG provides that state parties should provide protection and access to dispute resolution mechanisms regardless of the legal status of the worker.<sup>246</sup> However, this is not followed in practice. One example would be the repatriation of 41 migrant women workers who were stranded in Riyadh for 18 months.<sup>247</sup>

#### Box Item 5: Repatriation of Sri Lankan migrant women workers who were stranded in Riyadh for 18 months

##### BOX ITEM #5<sup>245</sup>

In May 2021, 41 women migrant workers who were detained in Riyadh, Saudi Arabia, were repatriated to Sri Lanka after 18 months. It was reported that the workers were detained at the Exit 18 Deportation Detention Centre in Riyadh awaiting repatriation. While the legal basis for detention in Saudi Arabia is unclear, it was indicated that a reason for detention was overstaying the valid visa period under the Kafala system in Saudi Arabia. Under this system, migrant workers are tied to a single employer who has the sole power of renewing or terminating the workers' residency and work status. Workers under this

system, particularly those in the construction and domestic sectors, are often subject to abuse by their employers. The reasons for detention of migrant workers included reasons such as expiration of the work permit, employer's failure to obtain exit permit and that the workers have fled from an abusive employer. It was only after the public discourse and media exposure of this issue that the government officials took measures to expedite repatriation of these women and children.

The expedited measures taken by the government after media exposure imply that without public scrutiny there is an unwillingness among officers to resolve migrant workers' issues. This incident also exemplifies the lack of coordination, clarity and the complacency of officials. It also highlights the absence of a coherent system in both countries to take expedited action, to protect migrant workers' rights. Moreover, the incident implies the serious deficit of protection afforded to workers in terms of the right to legal assistance, good shelter facilities, a fair trial and hearing, and due process.

### c. Labour laws in CoDs

Almost none of the Gulf countries extend protection under national labour laws to migrant workers, specifically for domestic work.<sup>248</sup> Migrant workers are merely recognised as foreigners in the CoD and are not protected by the general labour laws available to local employment categories in the CoD. Since a majority of Sri Lanka's migration labour force consists of domestic workers, the lack of protection afforded by the labour laws of CoDs is a cause for concern. Systems such as Kafala are notably dangerous to domestic workers as the employers in the system retain full control of the employment with minimal regard to workers' rights.<sup>249</sup> In many instances, migrant workers in the Gulf countries have run away from their employer due to the absence of a due process of effectively handling complaints or grievances.<sup>250</sup> Therefore,

legal and policy reforms in Sri Lanka are required to safeguard and uphold migrant workers' rights in line with the international standards. Recommendations for reforms that Sri Lanka could take will be dealt with in later sections.

#### d. Challenges preventing unionisation

The right to association and participation in a trade union is recognised as a basic human right of a migrant worker.<sup>251</sup> However, the support received from the state in terms of forming trade unions among migrant workers is minimal. KIIs reveal that there are groups of migrant workers who have organised themselves as unions to support other migrant workers with their rights. One of the main obstacles to formulating unions is the difficulty of organising thousands of workers who have different employers.<sup>252</sup> Other issues include the lack of a legal framework in support of the unionisation of migrant workers, the difficulty of establishing a self-sustaining union with the inadequate financial income received by the migrant workers and the lack of regional or cross-border cooperation.<sup>253</sup> The absence of unionisation or a united front formulated by migrant workers affects them adversely as the workers lack proper representation before the SLBFE and other authorities when presenting their grievances.<sup>254</sup>

#### e. Family background report (FBR)

The administrative burden imposed by the requirement to obtain an FBR has been criticised as discriminatory towards women.<sup>255</sup> Moreover, the lengthy administrative

procedure has tended to push migrant workers towards using irregular channels of migration. The FBR was implemented to reduce the negative psychological impact on children associated with the mother's migration.<sup>256</sup> As such, women with children below the age of five are required to submit an FBR providing information that children have sufficient alternative care in her absence.<sup>257</sup>

The requirement of the FBR has been identified as discriminatory on two counts: firstly, mothers of younger children have the additional administrative hurdle of the FBR compared to mothers of older children.<sup>258</sup> Secondly, women have an additional burden in raising children and ensuring the protection of children when migrating as a result of the FBR.<sup>259</sup> This burden does not seem to apply to men when migrating. Nevertheless, the requirement of the FBR has ultimately resulted in increasing difficulties for female parents attempting to find employment abroad while compounding further economic hardships.<sup>260</sup>

The long list of documentation involved in the preparation of the FBR often poses an impediment for potential female migrants as it subjects them to a rigorous administrative process. The administrative hassle is such that the FBR process requires women to provide sufficient evidence of a proper guardian to care for the children while she is overseas.<sup>261</sup> This administrative process, which forces women to produce multiple approvals from several officers, often has had the effect of pushing female migrant workers away from the legitimate channels of securing jobs abroad toward irregular migration.<sup>262</sup>

## 4.5. COVID-19-RELATED ISSUES

### a. Shelter facilities

The COVID-19 pandemic signified the lack of a coherent mechanism that safeguards and prioritises the basic rights of Sri Lankan migrant workers. For instance, incidents were reported at the height of the COVID-19 pandemic of migrant workers who had lost their

employment, income and accommodation, and who were infected and stranded due to inadequate collaboration between Sri Lanka and consulate divisions of the host countries.<sup>263</sup> These workers' access to shelter facilities and basic medical care from the CoDs was inadequate.<sup>264</sup>

The SLBFE, in collaboration with the Ministry of Foreign

Relations, was able to fund the shelter and medical facilities to protect these workers until repatriation.<sup>265</sup> This signifies the importance of a comprehensive bilateral relationship that provides for legal assistance and the protection of migrant workers' fundamental rights while in the destination country, especially during unprecedented times such as the COVID-19 pandemic.

#### **b. Premature termination of employment contracts**

KIIs revealed that some of the migrant workers in the semi-skilled sector were compelled to return to Sri Lanka as their employment contracts were prematurely terminated due to the COVID-19 pandemic. Reasons for premature termination varied from lack of business to economic conditions and insufficient financial capacity.<sup>266</sup> A research study conducted in 2021 using online and personal interviews with Sri Lankan migrant workers based in Qatar revealed some of the reasons for the reduction in the money remitted

to Sri Lanka.<sup>267</sup> These reasons include pay cuts, overall economic uncertainties created by the pandemic and potential pay cuts.

KIIs with SLBFE officials noted that, as of February 2022, the actions taken to help migrant workers to regain lost wages and contracts terminated due to COVID-19 are limited. Basic labour rights of workers include (i) uncertainties surrounding the claiming of back wages, (ii) filing for compensation, (iii) regaining the lapsed contract or enforcing the contractual provisions, and (iv) securing foregone employment. Deprivation of such basic rights indicates the lack of a meaningful system to safeguard migrant rights. According to the UN Advisory Note on COVID-19 Socioeconomic Response (July 2020), the state should adopt economic measures to reintegrate the migrant returnees into society.<sup>268</sup> However, Sri Lankan reintegration support is, reportedly, largely concentrated on providing immediate health support (testing, quarantine and treatment).<sup>269</sup>

## **4.6. SUMMARY OF ISSUES UNDER PRINCIPLE 6**

**a. Individual employment contracts:** In the absence of legislation in the CoD that clearly articulates the employer's obligations in protecting migrant workers' rights, individual contracts are imperative to hold the employers accountable for upholding migrant workers' rights. However, due to enforcement and double contracting issues, individual contracts currently provide very little protection to workers.

**b. Bilateral agreements:** Bilateral arrangements between the CoDs and Sri Lanka are another way of securing workers' rights. Binding the CoD to uphold the employer's responsibility through a bilateral agreement can ensure the protection of migrant workers. However, there are currently two issues with regard to these agreements: (i) these agreements are not transparent and are not publicly available for review and (ii) the ones that are available only marginally specify the rights that require protection. According to KIIs, most bilateral agreements are said to be too generic, wide and subject

to the interpretation of the parties, which again renders inadequate protection afforded to the workers through the agreement.

**c. Workers are excluded from CoD labour laws:** Most migrant workers - domestic workers specifically - do not fall under the purview of the general labour laws of the CoDs applicable to other sectors of employment and, therefore, are treated as foreigners. This discrepancy makes domestic workers more vulnerable to labour exploitation and they can be subject to serious violations of rights.

**d. Repatriation of workers:** The absence of a structural mechanism or a guideline on repatriation, the lack of coordination between authorities and the complacency of officers have resulted in undocumented migrant workers or workers with visa issues being stranded or detained in shelter facilities without adequate protection, solutions or repatriation.

## 4.7. RECOMMENDATIONS

This section provides seven selected recommendations to address the challenges summarised above to uphold human rights within the recruitment process of migrant workers in Sri Lanka.

**1. Adding the SLBFE as a signatory to the employment agreement:** Naming the SLBFE as a third party in a supervisory capacity to the arrangement between the employer and worker will be beneficial in eliminating biases or contracts unusually favourable toward employers.<sup>270</sup> The individual contract plays a vital role in protecting migrant workers' rights in the CoD. SLBFE's oversight as a signatory to the agreement can be effective in holding the employer accountable for his/her actions. Therefore, by making the SLBFE a party to the agreement, it provides access and visibility to the arrangement between the employer and the worker.

Alternatively, Sri Lanka can lobby for standardised employment contracts for each employment category that includes terms and conditions agreeable to both Sri Lanka and the CoDs.<sup>271</sup> Sri Lanka could first initiate this with the countries that it has signed MOUs with. Standardised employment contracts are a common protection method used by countries such as Jordan, Lebanon, Taiwan and Malaysia.<sup>272</sup> Standardised contracts will not only afford protection against contract substitution but will also increase enforceability in courts of law in CoDs.

**2. Cross-border cooperation should be strengthened to facilitate the safe return and effective integration into labour markets.**<sup>273</sup> Migrant workers in irregular statuses should be encouraged to return home and, once returned, they should be directed towards effective social and economic integration systems. Such repatriation processes could be strengthened by effective bilateral collaborations that facilitate the efficient passage of information and regularisation between countries.<sup>274</sup> The Philippines has extended safe passage to Filipino

migrant workers, helping ensure they can return to the CoD if they have a valid employment contract.<sup>275</sup> Similarly, during the COVID-19 pandemic, the governments of India and Nepal instituted an arrangement to facilitate safe passage for workers between the two countries in accordance with the Peace and Friendship Treaty of 1950.<sup>276</sup> Sri Lanka is also part of an initiative that provides helpline support, named "Contact for Sri Lanka", for workers in CoDs including information services, humanitarian support and legal assistance.<sup>277</sup> However, there is limited information on the availability of this service.

**3. COVID-19-related policies:** In relation to COVID-19 relief measures, the national policies of Sri Lanka about migrant workers should be reframed to include World Health Organisation (WHO) guidelines compelling the CoDs to provide adequate health facilities across all levels. Such measures can include:<sup>278</sup>

- i. ensuring access to temporary accommodation that allows migrant
- ii. workers to avoid congestion;
- iii. ensuring access to clean water and sanitation;
- iv. enabling equitable access to healthcare; and
- v. providing access to social protection mechanisms;

Bilateral relations should be modified to integrate measures that ensure health facilities and related services to migrant workers.

**4. Promotion of association:** In relation to the formulation of trade unions, both origin and destination governments should be encouraged to ratify ILO Decent Work for Domestic Workers' Convention (Sri Lanka has not ratified this convention). This convention provides wider protection to domestic

workers and it also effectively recognises freedom of association.<sup>279</sup> Bilateral ties between governments should be advanced to enable regional alliances and partnerships with global unions to increase the network, information flow and mutual support of other states.<sup>280</sup>

**5. Undocumented migrants or migrants that lack legal**

**status:** State parties should provide administrative detention of migrant workers who lack legal status only as a last resort by including relevant provisions within bilateral agreements. Simultaneously, state parties should promote non-custodial alternatives that safeguard migrant workers' rights.<sup>281</sup> States should also take steps to ensure that administrative and judicial procedures for workers in irregular settings are guaranteed due process on par with the other workers of the CoDs.<sup>282</sup>

**6. Training for workers:** Enhance the quality and effectiveness of training courses with modern and useful curricula that promote awareness of workers' rights

and minimum labour standards. Migrants should be educated and trained on their entitlements, rights and legal enforcement mechanisms/measures/methods. Information should be provided that encompasses fair recruitment, important legislation, languages used and gender-sensitive topics to eliminate any discriminatory treatments that may arise at the workplace in the CoD.

**7. Promote ratification of conventions by CoDs:**

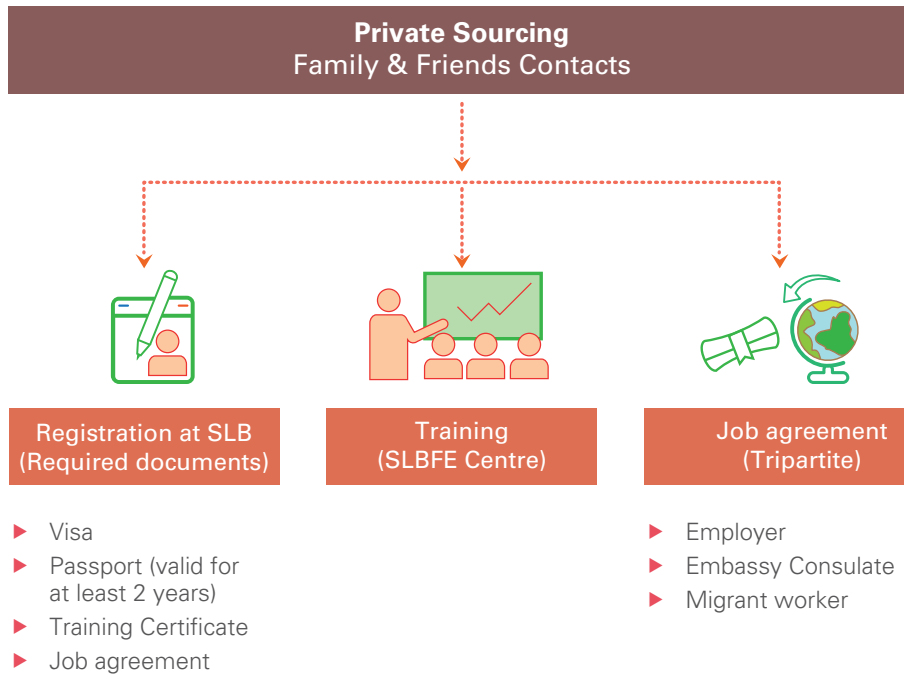
Sri Lanka should actively advocate CoDs to ratify international conventions during bilateral discussions. Gulf countries should also be prompted towards extending their national labour laws toward domestic migrant workers so that they have legitimate means of seeking redress against any violation of labour rights. Source countries should push forward these measures through regional dialogue as a collective request to protect their migrant workers. Sri Lanka should, therefore, actively participate in inter-state coordinated efforts that promote the safe migration and protection of migrant workers' labour rights.

# Annex 1

## STEPS TO OBTAIN SLBFE APPROVAL FOR FOREIGN EMPLOYMENT



Source: SLBFE Manual, 2018, p. 117





# Endnotes

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Verité conducted studies in relation to trafficking in persons in Sri Lanka with a particular focus on labour migration in 2017 and 2021. Both studies identified that although trafficking is criminalised under Sri Lankan law, its enforcement continues to be weak in practice. Sri Lanka Bureau of Foreign Employment Act, No. 21 of 1985 (SLBFE Act); the Penal Code Ordinance, No. 2 of 1883 as amended in 2006.
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