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## 1 Introduction

Sri Lanka is primarily an origin country of labour migration. The oil boom in the Gulf States in the early 1970s marked the beginning of significant outflows of migrant workers from Sri Lanka. The contribution of labour migration to the Sri Lankan economy is substantial. Migrant remittances are now the major source of foreign exchange. In 2014 the total value of remittances reached US\$7 billion, amounting to 9,6 per cent of GDP, and 62 per cent of export earnings. Annual reported outflows of migrant workers have ranged between 250 000 to 300 000 in the five years up to 2015.<sup>1</sup> The total outflow of 300 413 workers in 2014 represents 3,5 per cent of the employed population. While there are no estimates of the number of foreign migrant workers in Sri Lanka, the United Nations has estimated 38 700 persons as international migrants in the country in 2015,<sup>2</sup> which is only 0,2 per cent of the population.

The objective of this Chapter is to review the status of adherence in law and practice to the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) which Sri Lanka acceded to on 11 March 1996. It first outlines the migration context in Sri Lanka. Section 3 traces the background to accession of the ICRMW. Section 4 highlights various policy and institutional initiatives of Sri Lanka relating to migration and their contribution to implementation of the ICRMW. Following a discussion of interactions between the government and civil society with the Committee on Migrant Workers (CMW) in Section 5, the Chapter raises a number of major issues relating to compliance with the Convention. The final section draws some conclusions.

1 SLBFE 'Annual statistical report of foreign employment 2013: Sri Lanka Bureau of Foreign Employment' (2015).

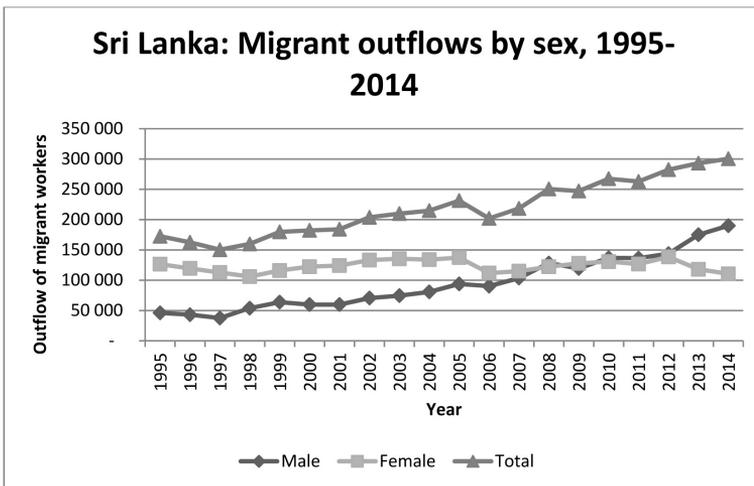
2 UN DESA 'International migration report 2015: Highlights' (2016) 30.

## 2 Migration context of Sri Lanka

Sri Lanka’s overseas migration pattern has gone through several stages over the years.<sup>3</sup> The first outflows in the 1960s and 1970s related mainly to the migration of skilled persons on a permanent basis, but the Gulf boom in the early 1970s created a large demand for low skilled workers on temporary contracts. The outflow gathered high momentum following liberalisation of travel with the introduction of open economy policies in 1977. The main challenge foreseen at the time was the regulation of the growing number of recruitment agencies.<sup>4</sup> Sri Lanka enacted the Sri Lanka Bureau of Foreign Employment Act in 1985 and established the Sri Lanka Bureau of Foreign Employment (SLBFE) as a one stop-shop to deal with administration of overseas employment.

Since 1995, the annual numbers departing for overseas employment have been above 150 000. Figure 1 shows the outflows by sex from 1995 to 2014. It also shows the changing shares of males and females in total outflows.

*Figure 1: Outflows by sex from 1995 to 2014*



Annual migrant outflow data<sup>5</sup> show a marked decline in the share of female migrants, especially domestic workers, in recent years. The share of

3 P Wickramasekara 'International migration and employment in the post-reforms economy of Sri Lanka' (2010).  
 4 D Soysa 'Early days of SLBFE' paper prepared for the ILO Regional Office for Asia and the Pacific' (unpublished & undated).  
 5 These statistics are collected by the SLBFE through registration of migrant workers. It uses the term 'housemaids' to refer to female migrant domestic workers.

female migrant workers fell from 55 per cent to 37 per cent of total outflows during 2006-2014. Over the same period, the share of female domestic workers (termed as 'housemaids' in SLBFE statistics) in total annual reported departures has fallen from 49,4 per cent to 29,5 per cent. This marked decline is in line with government policy to discourage emigration of low skilled female workers, especially domestic workers, through several measures: raising minimum age limits according to destinations, imposition of a security deposit requirement for direct recruitments, introduction of a Family Background Report to determine eligibility for emigration of female workers with children less than five years, and the mandatory NVQ3 qualification (National Vocational Qualification) for female domestic workers.<sup>6</sup> These figures probably underestimate actual flows since some women seem to have left the country through other means such as visit visas. These features also lead to a number of challenges related to vulnerability and protection needs, high migration costs, low remuneration and resulting low remittances.

The main features of Sri Lanka's migration profile are: migration mostly on temporary contract basis; high share of low skilled workers including domestic workers; concentration of flows to Gulf Cooperation Council (GCC) destinations; the dominant role of the private recruitment industry in placements; and high share of female migration (although declining) compared to other South Asian countries. The GCC countries account for almost 90 per cent of recorded outflows from Sri Lanka, which indicates that the vulnerability of migrant populations is high given the proverbial poor governance and protection levels in the subregion. Private employment agencies still account for 60 per cent of outflows again posing formidable challenges in their regulation to minimise malpractices.

### **3 Evolution of policy, institutions and legislation relating to migration**

The continued focus on foreign employment of national workers has ruled out any attention in national migration policies to the status of foreign migrant workers inside Sri Lanka and their protection, a major thrust of the ICRMW.

Table 1 provides an overview of major changes in policies and institutions on labour migration. It shows that the mandate on labour migration had remained with the Ministry of Labour for a considerable time with a dedicated Ministry taking over the functions only in 2007.

6 MFEPW 'Performance report 2014: Ministry of Foreign Employment Promotion and Welfare' (2014).

The SLBFE, the main agency responsible for overseas employment administration, was established by the SLBFE Act 21 of 1985, the primary legislation that deals with foreign employment, amended by Acts 4 of 1994 and 56 of 2009. From the outset, the SLBFE operated under the supervision of the Ministry of Labour until 2007 when it was transferred to the newly created Ministry of Foreign Employment Promotion and Welfare (MFEPW). Most MFEPW programmes are administered by the SLBFE. This change of ministries has both positive and negative aspects. The advantage is that a dedicated ministry can devote greater attention to migration. The disadvantage is that labour migration is separated from labour, employment and decent work policies in the process. With ministries other than labour taking over this role, there is also limited scope for involvement of social partners and civil society in migration policy – a recommended good practice in international instruments.<sup>7</sup>

**Table 1: Chronology of migration policy, institutions and legislation in Sri Lanka**

Year	Event
Mid-1970s	Temporary contract labour migration to the Middle East from Sri Lanka commences.
1980	Ministry of Labour in charge of migration. Foreign Employment Agency Act 32 of 1980 to regulate recruitment agents.
1983	The Ministry creates foreign employment wing.
1985	Sri Lanka Bureau of Foreign Employment (SLBFE) Act 21 of 1985 adopted, and the SLBFE created in the same year.
1994	Revision of the 1985 SLBFE Act – Act 4 of 1994.
1996	Sri Lanka accedes to the ICRMW on 11 March 1996.
2007	A new Ministry of Foreign Employment Promotion and Welfare (MFEPW).
2008/2009	Sri Lanka's first report to the Committee on Migrant Workers (CMW) and its review
2008/2009	National Labour Migration Policy formulated and endorsed by Cabinet.
2009	Revision of 1985 SLBFE Act – Act 56 of 2009.

7 P Wickramasekara 'Labour migration in South Asia: A review of issues, policies and practices' International Migration Papers No 108 (2011).

2010	MFEPW abolished and foreign employment mandate transferred to Ministry of External Affairs.
2010	National Advisory Committee on Labour Migration formed.
November 2010	Ministry of Foreign Employment Promotion and Welfare (MFEPW) established as a separate ministry.
2010-2015	An ILO technical cooperation project to support the implementation of the National Labour Migration Policy supported by Swiss Development Cooperation Agency operational.
2013	Second periodic report to CMW postponed at request of Sri Lanka government.
2011-2016	Sri Lanka Employment Migration Authority Act being drafted and discussed by MFEPW to replace SLBFE Act.
2014	Introduction of a mandatory family background report for women migrating as domestic workers.
2015	MFEPW renamed as Ministry of Foreign Employment (MFE).
2016	Second periodic report of Sri Lanka to the CMW submitted on 3 May 2016. Discussion and review of the Second Periodic Report, August/September 2016.

A few observations can be made on developments since the 1990s:

- (a) Frequent changes of ministry portfolios dealing with foreign employment have made continuity of policies difficult.
- (b) There is no evidence of any major change to migration legislation, especially after accession to the ICRMW in 1996. The revisions reflected in Act 56 of 2009 were motivated by factors other than making it consistent with the ICRMW.
- (c) Sri Lanka has been a pioneer in Asia in spelling out a rights based comprehensive National Labour Migration Policy<sup>8</sup> based on the 2006 ILO Multilateral Framework on labour Migration.<sup>9</sup>
- (d) The Government has highlighted '[s]killed, safe migration' as the major focus of policy.<sup>10</sup> This has led to measures which try to reduce the share of low-skilled workers, especially female domestic workers, who go abroad. The recognition that the state is unable to prevent the abuse and exploitation of women workers overseas effectively, and the fact that children left behind are subject to various abuses are the main reasons for this policy. Raising of the minimum age for domestic workers depending

8 See MFEPW 'National Labour Migration Policy for Sri Lanka' (2008).

9 ILO 'The ILO multilateral framework on labour migration: Non-binding principles and guidelines for a rights-based approach to labour migration' (2006).

10 MFEPW (n 8 above).

on destinations and the introduction of a family background report for women with children less than five years' old are some of the measures which have been adopted.

#### 4 Background to Sri Lanka's accession to the ICRMW

Sri Lanka acceded to the ICRMW on 11 March 1996. It is important to note that it was a bold decision to have a one-step accession rather than a two-step process of signature and ratification.<sup>11</sup> While accession normally takes place after a Convention enters into force, Sri Lanka acceded to the ICRMW seven years before it came into force in July 2003.

There is very limited information on the background to the accession to the ICRMW in March 1996. It is also a formidable task to trace this background 20 years after accession. An interview with Mr Prasad Kariyawasam, member and former Chair of the CMW revealed that the main motive was the perceived need to protect Sri Lanka's migrant workers. A former senior diplomat of Sri Lanka was able to shed more light on the issue. In his view, the reluctance on the part of the migrant receiving countries of the Middle East to entertain bilateral approaches to take up issues of internationally recognised rights of Sri Lankan migrant workers was a compelling reason for Sri Lanka to seek multilateral means to address the issue by ratifying the ICRMW. By acceding to the ICRMW, the Sri Lankan government hoped that the moral/legal force and the institutional capability of the Convention would help to get international attention focused on abuse and exploitation of Sri Lankan migrant workers through activities of international human rights agencies, UN agencies and civil society.

Iredale and Piper in their analysis of obstacles to ratification of the Convention in the Asia-Pacific region have not elaborated on the reasons why Sri Lanka acceded to it.<sup>12</sup> Their second report for UNESCO on the impact of the ICRMW in the Philippines and Sri Lanka touched briefly upon the issue.<sup>13</sup> Their general observations primarily based on interviews with government officials and NGOs are as follows:

- 11 This distinction has been overlooked in the study by Iredale et al which refers to ratification of the ICRMW rather than accession by Sri Lanka, which is technically not correct. See Iredale et al 'Impact of ratifying the 1990 UN Convention on the Rights of All Migrant Workers and Members of Their Family: Case studies of the Philippines and Sri Lanka' (2005). While the legal effect is the same, ratification is possible only after the initial step of signature. See United Nations *Treaty handbook* (2012).
- 12 Iredale et al 'Identification of the Obstacles to the Signing and Ratification of the UN Convention on the Protection of the Rights of All Migrant Workers: The Asia-Pacific Perspective' (2003).
- 13 Iredale et al (n 11 above).

- (a) The lead role in the accession was probably taken by the Ministry of Foreign Affairs rather than the line ministry – the Ministry of Labour.
- (b) The decision to accede was not driven by a ‘vibrant civil society movement’.
- (c) They surmise that the decision was instigated by the UN in New York and carried out by the government in power, based on the interviews conducted by them.

Iredale et al state:

It is suspected by some NGOs that this was more a routine ratification on the part of the Sri Lankan government rather than a political commitment to protect migrant workers.<sup>14</sup>

The present author interviewed key informants consisting of current and former officials of the Ministry of External Affairs (now Ministry of Foreign Affairs), the Ministry of Labour and the Sri Lanka Bureau of Foreign Employment. The author also consulted some records of the Sri Lanka archives relating to the period immediately before accession, but was not able to find any references to the process. Accession to a complex instrument such as the ICRMW consisting of 93 articles of text would have required intensive review and informed discussions. Direct accession also probably restricted the scope for public discussions or debates which would have been possible during the normal time gap between a signature and the eventual ratification, as in Bangladesh. Sri Lanka did not understand the full gravity of responsibilities of accession at the time as admitted by the former Chairman of the CMW.<sup>15</sup>

It is surprising that Sri Lanka’s first report to the CMW does not mention any reasons or the background to the accession which would have helped in understanding the process of implementation. It simply stated that Sri Lanka as a state party sought to ensure minimum international guarantees relating to the human rights of migrant workers and their families. It added an unrelated observation: ‘However, “major labour” recipient countries are yet to become parties to this Convention’.<sup>16</sup>

What is also often overlooked is that Sri Lanka made ‘declarations’ against four articles of the ICRMW upon accession when it deposited the instrument. These mainly relate to rights of mobility, child rights and equal treatment of foreign workers.<sup>17</sup> While a declaration may simply state the existing national laws and practices, some of these could be considered reservations if they limit or modify the obligations undertaken by the state

14 Iredale et al (n 11 above) 34.

15 Cited in Iredale et al (n 11 above).

16 Initial report of Sri Lanka, CMW (23 April 2008), UN Doc CMW/C/LKA/1 (2008) 5.

17 Arts 8(2), 29, 49 and 54.

party.<sup>18</sup> Further research is necessary to see how the Sri Lankan government has implemented these articles in practice.

## 5 Impact of the Convention on law and practice relating to migration and migrant workers in Sri Lanka

This section reviews the major pieces of legislation and policies relating to migration in Sri Lanka, and any links with the ICRMW. The need for revision of the law in line with the ICRMW had been highlighted in several important documents. The National Labour Migration Policy of 2008, for example, stated:

One of the main gaps in the legislation is that the law has yet to be amended following the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.<sup>19</sup>

The Sri Lankan government in its initial report to the CMW maintained that existing legislation provided many of the standards and guarantees of the Convention. The fact remains, however, that the Constitution of Sri Lanka guarantees certain rights, including protection against discrimination and the right of peaceful assembly, freedom of association, freedom to form and join a trade union, freedom to engage in any lawful occupation, or profession, and freedom of movement to citizens only. This violates several provisions of the ICRMW such as articles 7, 26, 39 and 40, amongst others.<sup>20</sup>

The CMW was not convinced of the guarantees provided by the existing legislation and expressed its regret

that the State party has not taken any measures to ensure that its legislation is in conformity with the Convention' and recommended Sri Lanka 'to take all necessary measures for prompt harmonization of its legislation with the provisions of the Convention.'<sup>21</sup>

The section on migrant workers in the Sri Lanka National Action Plan for the Protection and Promotion of Human Rights, 2011-2016 identified the major issue in giving effect to the ICRMW as follows: 'Lack of adequate

18 *Treaty handbook* (n 11 above). The author is grateful to Mr Bradford Smith, Secretary of the CMW, Office of the High Commissioner for Human Rights, Geneva, for this clarification.

19 MFEPW (n 8 above) 49.

20 Report of the Special Rapporteur on the human rights of migrants, François Crépeau: Addendum – Mission to Sri Lanka, HRC (2 April 2015), UN Doc A/HRC/29/36/Add.1 (2015); S Ranaraja *Review of national legislation and regulations on migration for foreign employment and their implementation* (2010).

21 Concluding Observations on the Initial Report of Sri Lanka, CMW (14 December 2009), UN Doc CMW/C/LKA/1 (2009) 3.

national laws and policies to give direct effect to the UN Convention on the Rights of All Migrant Workers and their Families'.<sup>22</sup>

### **5.1 Sri Lanka Bureau of Foreign Employment Act 21 of 1985 and its amendments**

The major piece of legislation governing migration in Sri Lanka, the SLBFE Act, was enacted in 1985 – eleven years before the country's accession to the ICRMW. The main issue to be discussed then is whether the SLBFE Act has been revised to reflect the provisions of the acceded ICRMW. It is worth pointing out, and indeed it is to the credit of Sri Lankan legislators, that some of the provisions of the Convention had been addressed to some extent in the 1985 Act: information provision, pre-departure training, and regulation of recruitment agencies, international cooperation and consular services, and reintegration measures for returnees.<sup>23</sup>

The aforementioned National Labour Migration Policy of 2008 highlighted a number of areas to bring the SLBFE Act into conformity with the ICRMW:

Among these are: translation and dissemination of the Convention to would-be-migrants; making available the services of a legal counsel at the Sri Lankan embassies abroad; educating or informing would-be-migrants in more detail of the social, cultural, and economic conditions and to explain the (labour and other) laws and customs of the host country; ensuring that the employment contract is made available to the workers in his/her own language; making available free interpretation in the language of the migrant workers when needed in the host country; ensuring the voting rights of the migrant workers; providing the necessary training to would-be migrants; regulating the private agencies more rigorously and to minimize trafficking and irregular migration.<sup>24</sup>

While some of the above measures have been implemented in varying degrees, the overall impact of the Act on governance of labour migration and protection of migrant workers and their families seems rather limited. The Act was revised in 1994 and 2009, but an analysis of the legislative texts shows that the purpose was not to address Sri Lanka's compliance with the ICRMW following its accession.

22 HRCSL 'Sri Lanka national action plan for the protection and promotion of human rights, 2011-2016' (2011) 94.

23 MFEPW (n 8 above).

24 MFEPW (n 8 above) 47.

### 5.1.1 *Sri Lanka Bureau of Foreign Employment (Amendment) Act 4 of 1994*

Under the amending Act 4 of 1994, the SLBFE was declared as a scheduled institution under the Bribery Act with a view to preventing corruption and bribery. It also formalised the fee structure to be paid by migrant workers and its distribution.<sup>25</sup> This was important because the SLBFE was expected to be a self-sustaining entity with no direct budget support. The amended Act also provided for the Minister to determine and adjust the fee structure from time to time through gazette notification. The Act spelled out fines and imprisonment terms for violations of the Act by migrant workers or licensed agents. The thrust of these measures, therefore, was not to promote protection of workers, but to ensure smooth operation of SLBFE and its programmes.<sup>26</sup>

### 5.1.2 *SLBFE amendment Act 56 of 2009*

This amendment took place after the formulation of the National Labour Migration Policy with the SLBFE also participating as a key stakeholder in that policy's development process. But the revision to the Act was carried out by the SLBFE on its own as a parallel process with hardly any consultation with stakeholders.<sup>27</sup> Surprisingly the revisions also failed to take into account the policy guidelines and the action plan contained in the National Labour Migration Policy. Nor was there any attempt to make it compliant with the provisions of the ICRMW.<sup>28</sup>

The primary amendments in the revised Act provided for:

- (a) the authority of the SLBFE to examine documents to detect persons going for overseas employment without registration;
- (b) the receipt by the SLBFE of social security levies from employers abroad;
- (c) restrictions on publication of job advertisements by private employment agencies without SLBFE approval;
- (d) recruitment agencies to recover expenses directly from workers where no commission is received from the foreign employer or agent with SLBFE approval. At the same time, SLBFE reserved the right to review whether commissions/fees were reasonable;

25 The fee is distributed as follows: 70% to the recruitment agencies, 10% to the Workers' Welfare Fund and 20% to the SLBFE for its operational expenses.

26 Ranaraja (n 20 above).

27 Migrant Forum Lanka (MFL) 'Submission to the UN Committee on Migrant Workers (CMW) by Migrant Forum Lanka on the situation of international outbound labour migration in Sri Lanka' (2013).

28 The author was directly involved as an ILO advisor in the formulation of the National Labour Migration Policy, and used informal contacts with the SLBFE at the time to request sharing of the amended draft Act with the ILO and national stakeholders for review. The SLBFE, however, ignored the request.

- (e) wide ranging powers for officers of the SLBFE to arrest errant job agents as the Act recognised SLBFE officers to be public officers under the Penal Code and the Criminal Procedure Code immune from lawsuit; and
- (f) membership of the Association of Licensed Foreign Employment (ALFEA) to be voluntary for licensed agents. The SLBFE apparently was not happy with the monopoly status of ALFEA and wanted to reduce its powers.<sup>29</sup> This, however, undermined the coordinating role of ALFEA as its membership was reduced. Moreover, the revision did not modify other references to ALFEA in the Act leading to some inconsistency about its expected role.

Thus, the 2009 amendment has given wide ranging powers to the SLBFE, and has also undermined the coordinating function of ALFEA. It is difficult to argue that these were done for the sake of better protection and welfare of migrant workers or to bring the law into line with the ICRMW.<sup>30</sup> Indeed there was no reference at all to the ICRMW in the revised Act.

### ***5.1.3 Proposed Sri Lanka Employment Migration Authority Act of 2011 (MFEPW, 2012)***

The Ministry of Foreign Employment Promotion and Welfare finalised a draft bill to convert SLBFE into the Sri Lanka Employment Migration Authority to be submitted to the Cabinet of Ministers and Chief Legal Draftsman in 2012.<sup>31</sup> It aims to provide an overarching role for the Ministry in regard to overseas employment and inward migration, and replace the SLBFE with an authority. The Legal Draftsman, however, referred the draft Act back to the Ministry asking for major revisions which has again been delayed due to political changes in early 2016. The new Secretary of the Ministry has now appointed a committee to look into the revision.

The 2012 draft Act covers all aspects of the migration process, and provides for the establishment of a number of institutions: the Sri Lanka Employment Migration Authority, a national advisory council on employment migration, a Sri Lanka Employment Migrants Foundation (Rata Viruwo), an Overseas Sri Lankan Foundation, a foreign employment promotion fund, a Workers Welfare Fund, and a migrant information database.

29 Personal communication to the author by a former Additional General Manager of the SLBFE.

30 Ranaraja (n 20 above).

31 MFEPW (2012). The author had access to a draft version of the Act dated 21 March 2012, but not to any further revised version. The general observations made here pertain to the above version, and may not represent the contents of the latest draft. The government had made a copy of the draft Act available to the Special Rapporteur on the human rights of migrants during his visit in 2014, Crépeau (n 20 above).

The objectives of the draft Act are arguably too long, running to 37 items. There seems to be some confusion between objectives and functions in this context. The SLBFE Act had only 19 objectives which itself was too long.<sup>32</sup> The draft Act contains detailed provisions which would have been better placed as regulations and decrees under the Act. Moreover, the draft Act seems to overlap partly with the mandates of other ministries such as the Ministry of Labour and the Ministry of Health, a problem pointed out by the Legal Draftsman's Department.<sup>33</sup> One positive aspect was extension of legal coverage to foreign migrant workers, but this has subsequently been dropped.<sup>34</sup>

The main problem with the Act is that the protection objectives and consistency with the ICRMW seem to be given secondary importance with governance and regulation and diaspora concerns being predominant. The basic thrust is to convert the SLBFE into an authority with comprehensive powers and functions. The draft does not refer to the ICRMW or any other international instrument or to the recommendation of the CMW asking that Sri Lanka take all necessary measures for prompt harmonisation of its legislation with the provisions of the Convention.<sup>35</sup> A contrast can be made with the title of the Bangladesh Overseas Employment and Migrants Act 2013. The latter Act specifically mentions the objectives of safe and fair migration, ensuring rights and welfare of migrant workers, and making provisions in conformity with the ICRMW and other international labour and human rights conventions and treaties ratified by the People's Republic of Bangladesh. This is sadly lacking in the proposed Act.

The inclusion of inward migration (immigration or immigrant workers inside Sri Lanka) does not seem to accord them rights spelled out in the ICRMW provisions, but focusses on registration and regulation of foreign workers. All these have led the UN Special Rapporteur on the human rights of migrants to urge 'the Sri Lankan authorities to revise the draft Act to ensure a human rights-based approach to migration'.<sup>36</sup>

## **5.2 National Labour Migration Policy, 2008**

The National Labour Migration Policy for Sri Lanka is regarded as a pioneering effort in Asia in spelling out a full-fledged policy and following a rights-based approach to labour migration based on international migrant-worker instruments including the ICRMW, ILO migrant-worker

32 Sri Lanka Bureau of Foreign Employment Act 21 of 1985.

33 Discussions with the ILO Office for Sri Lanka and the Maldives.

34 As above.

35 n 21 above.

36 Crépeau (n 20 above) 6.

conventions<sup>37</sup> and the ILO Multilateral Framework on Labour Migration.<sup>38</sup> The policy statement clearly provides:

The State undertakes primary responsibility for the protection of migrant workers and their families. Based on the obligations listed in the ratified International Convention on the Protection of the Rights of All Migrant Workers and their Families, the State is committed to furthering the rights and protections of Sri Lankans migrating for employment.<sup>39</sup>

Another example of good practice was the formulation of the National Labour Migration Policy through a tripartite plus participatory process involving all stakeholders concerned with migration in Sri Lanka. The stated vision of the Policy is 'to advance opportunities for all men and women to engage in migration for decent and productive employment in conditions of freedom, dignity, security and equity'. The Policy's three objectives are:

- (a) Better governance and regulation of labour migration;
- (b) Providing effective protection and services to migrant workers and their families left behind; and
- (c) Mobilising development contributions of labour migration.

The National Labour Migration Policy also contains an Action Plan for implementation of the policy elements. The draft Policy was validated at a national tripartite consultation in October 2008 with the Ministry of Foreign Employment Promotion and Welfare adopting the policy document and obtaining the approval of the Cabinet of Sri Lanka in April 2009. Both the Ministry of Foreign Employment and the SLBFE have incorporated the National Labour Migration Policy into their policies and programmes. The SLBFE corporate action plan has been reorganised under the three Policy objectives of governance, protection and development.<sup>40</sup> Yet both the Ministry and the SLBFE have failed to place copies of the Policy – the key document governing their policies and programmes – on their websites.

One limitation has been that no separate budget was allocated to carrying forward the Action Plan of the National Labour Migration Policy. The ILO has been assisting the implementation of Policy through support to the Sri Lanka government and civil society through two technical cooperation projects funded by the Swiss Agency for

37 ILO Convention on Migration for Employment, 1949 (No 97); ILO Convention on Migrant Workers (Supplementary Provisions), 1975 (No 143).

38 ILO (n 9 above).

39 MFEPW (n 8 above) 19.

40 Interview with Mr KODD Fernando, General Manager, SLBFE.

Development Cooperation from 2011-2015.<sup>41</sup> This has enabled Sri Lanka to meet some of the obligations of the ICRMW such as free provision of information, strengthening of consular facilities, and reintegration support, amongst others.

Although the number of foreign migrant workers inside Sri Lanka is believed to be small, a major gap in the National Labour Migration Policy is that it does not cover them at all. There are unconfirmed reports that the revised draft Sri Lanka Employment Migration Authority Act no longer covers 'inward migration'.<sup>42</sup> There is no information whether the current ongoing revisions to the draft Act have reconsidered inclusion of foreign workers under its coverage.

### **5.3 The National Action Plan for the Promotion and Protection of Human Rights 2011-2016, Human Rights Commission of Sri Lanka**

'Rights of migrant workers' are one of the eight priority areas identified by the Human Rights Commission of Sri Lanka (HRCSL), and incorporated into the Action Plan for 2011-2016.<sup>43</sup> The ICRMW is one of the 15 focus areas of the Action Plan with the goal of giving effect to the Convention at the national level. The Plan rightly recognises 'Lack of adequate national laws and policies to give direct effect to the UN Convention on the Rights of All Migrant Workers and their Families' and proposes three actions:

- (a) Review existing laws and policies and identify necessary changes to bring them in line with the ICRMW;
- (b) Based on the review, amend national level laws and policies; and
- (c) Translate the Convention into the official languages of Sri Lanka and disseminate widely.

The key responsible agencies for implementation of these activities have been identified as the MFEPW and the Ministry of Justice. All three actions foreseen in 2011 to be completed within a time frame of one and a half years had not been implemented by mid-2016. There is no evidence of a comprehensive review of existing laws and policies and needed changes – the first activity. As shown earlier, a draft Act is currently in limbo, and

41 The title of the Project is: 'Promoting decent work through good governance, protection and empowerment of migrant workers: Ensuring the effective implementation of the Sri Lanka National Labour Migration Policy – Phase I and Phase II'.

42 Discussions with the ILO Office for Sri Lanka and the Maldives.

43 n 22 above.

in any case the objective was not to bring it in line with the ICRMW. As regards translations and dissemination of the text of the ICRMW, the HRCSL website shows that only the English version is still available.<sup>44</sup> This means that even 20 years after accession, the Convention has not been officially translated and disseminated to major stakeholders by the state party in question. The Action Plan of HRCSL is elaborate, but the author's interview with the HRCSL did not bring out any evidence that it is seriously carrying out any follow up of the migrant rights component or coordinating with the relevant government agencies and other stakeholders.

## **6 Engagement of the state and civil society with the Committee on Migrant Workers**

### **6.1 State interaction with the CMW**

As noted above, Sri Lanka acceded to the Convention seven years before it came into force, and its initial report was due in 2004, but was submitted only in 2008. The delay in submission was probably motivated by some uncertainty about the format and content of the report, and the Government's desire to buy more time for preparation of the initial report. Sri Lanka's second periodic report was due on 1 July 2009, and the CMW requested Sri Lanka to submit it not later than 1 November 2011.<sup>45</sup> But it was postponed at Sri Lanka's request to 2016 – again a delay of more than four years! The second periodic report was eventually submitted by the government on 3 May 2016.<sup>46</sup>

Following its review of Sri Lanka's initial report the CMW came up with a list of issues for further clarification<sup>47</sup> to which the Government made a written reply.<sup>48</sup> Following discussions and consultations with other stakeholders, the CMW issued its Concluding Observations which covered a wide range of issues: need for harmonisation of legislation with the provisions of the Convention; ratification of ILO migrant worker conventions (no 97 and no 143) and the two Protocols on trafficking in persons and smuggling of migrants; training in and dissemination of the Convention; application of all rights without discrimination to foreign migrant workers inside the country; protecting and empowering women migrant workers; strengthening consular functions for protection of

44 See <http://hrcls.lk/english/document-center/library/international/> (accessed 30 November 2016).

45 n 21 above.

46 'Second periodic report of Sri Lanka' (2016).

47 'List of issues to be taken up in connection with the consideration of the initial report of Sri Lanka' (2009).

48 'Written replies by the Government of Sri Lanka to the list of issues (CMW/C/LKA/Q/1) to be taken up in connection with the consideration of the initial report of Sri Lanka' (2009).

migrant workers; voting rights for national workers abroad; measures for protection of workers in countries of destination; social security agreements with countries of destination; regulation of recruitment agencies; effective reintegration of returnees; study impact of migration on children; and prevention of human trafficking and irregular migration. The state party was expected to widely disseminate the Concluding Observations, and also report on progress in the second periodic report.<sup>49</sup>

The CMW has identified a detailed list of issues to be addressed in Sri Lanka's second report.<sup>50</sup> These cover mostly the issues raised in the Concluding Observations in 2009: comprehensive migration statistics; comprehensive information on measures for the protection and equal treatment of women migrant domestic workers; regulation and monitoring of recruitment agencies; reintegration of returnee workers; and the insurance schemes and the role of the Welfare Fund. Another issue raised is whether the state party had taken any steps towards ratifying the Protocol to Prevent, Suppress and Punish Trafficking in Persons, and ILO Convention No 189 (2011) concerning decent work for domestic workers. The List of Issues did not, however, refer to the need for ratification of the two ILO migrant worker conventions raised in the Concluding Observations in 2009 issued in response to Sri Lanka's initial report. Neither did it refer to the obvious relevance of the CMW General Comment 1 of 2001 on migrant domestic workers or General Comment 2 on the rights of migrant workers in an irregular situation.

A number of positive developments which partly address the issues raised in the 2009 Concluding Observations and the List of Issues prior to the submission of Sri Lanka's second periodic report can be mentioned.

- (a) The Government has developed a 'Safe Labour Migration Information Guide' (SLMIG) with support from the ILO/Swiss Development Cooperation Agency (SDC) migration project.
- (b) The Government ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children on 15 June 2015.
- (c) A Code of Ethical Conduct for Licensed Foreign Employment Agencies/Licensees has been developed<sup>51</sup> and private employment agencies have been given required orientation by the SLBFE.

49 n 21 above.

50 'List of issues prior to the submission of the second periodic report of Sri Lanka' (2013).

51 SLBFE 'Code of Ethical Conduct for Licensed Foreign Employment Agencies/Licensees' (2013).

- (d) A Sub Policy and National Action Plan on Return and Reintegration of Migrant Workers was adopted in December 2015.<sup>52</sup>
- (e) Complaints mechanisms have been improved with development of a centralised grievance mechanism and proposed special mediation courts.
- (f) Availability of a decentralised cadre of development officers including migration development officers who can provide support to potential migrants, departing migrant workers and returning migrant workers and their families at the local level.
- (g) Decentralisation of SLBFE to the provincial and district levels, and establishment of Migrant Resource Centres to provide one stop services at the local level.
- (h) Special social security scheme for domestic work submitted to the Cabinet for approval.
- (i) Promotion of consular functions to service migrant workers through introduction of a Manual for Labour Sections of Diplomatic Missions<sup>53</sup> and related training to diplomatic staff.
- (j) Agreement on domestic worker recruitment between the Ministry of Foreign Employment Promotion and Welfare and the Ministry of Labour of the Kingdom of Saudi Arabia, which contains a number of good practices relating to periods of leave, working hours, right to communication, and non-retention of passports.

The government is yet to take action on some of the issues raised by the CMW in the above reports. At the same time, abuses and exploitation of workers in overseas destinations continue as highlighted in the 2016 Shadow Reports by civil society to the 25th Session of the CMW.<sup>54</sup> Female workers are especially vulnerable being outside the labour law in many countries. More than three-quarters of total complaints made by Sri Lankan workers during 2011-2014 have been made by women workers.<sup>55</sup> This is more than likely an underestimate given that not all workers suffering abuse choose to lodge a complaint.

The CMW requested the government to disseminate the

concluding observations widely, including to public agencies and the judiciary, non-governmental organizations and other members of civil society,

52 MFE 'Sri Lanka: Sub-policy and national action plan on return and reintegration of migrant workers' (2015).

53 MFEPW 'Operational manual for Labour Sections of Sri Lankan diplomatic missions in destination countries' (2013).

54 'Sri Lanka NGO Shadow Report: Submitted by Action Network for Migrant Workers (ACTFORM) and the Women and Media Collective (WMC)' (2016); GMPA (2016); Shadow Report on Sri Lanka jointly submitted by 20 CSOs (2016); NCC in collaboration with Intervention Movement Against Discrimination and Racism (IMADR) and Migrant News Lanka (MNL) 'A response to the Second Periodic Report (SPR) of Sri Lanka' (2016).

55 SLBFE 'Annual Statistical Report of Foreign Employment 2013' (2015).

and to take steps to make them known to Sri Lankan migrants abroad and foreign migrant workers residing or in transit in the Sri Lanka.<sup>56</sup>

The author, however, could not trace any evidence of such dissemination by the Government.

Interviews conducted by the author in early 2016 showed that both the Ministry of Foreign Affairs and the MFE were aware of the need to submit the second periodic report in 2016, but there was no indication that the government had started on the process. Despite the substantial time made available, the actual second periodic report was prepared in a hurry (judging by the contents) without any broad-based consultation with other stakeholders, and submitted on 3 May 2016 to meet the deadline of the CMW.<sup>57</sup> The report is in the form of specific answers to each issue listed by the CMW in 2013, but it does not directly address the specific issues or sub-issues raised by the CMW. For example, there is no explanation of the progress made in harmonising legislation with the ICRMW.

While the government has ratified the Trafficking Protocol, it is equally important to ratify the Protocol against the Smuggling of Migrants by Land, Sea and Air in view of recent large scale boat movements especially to Australia – most of these represent smuggling attempts rather than trafficking in persons. The Government has also failed to make progress in regard to the ratification of the two ILO migrant worker conventions (nos 97 and 143) as recommended by the CMW in 2009. Given that a substantial share of domestic workers are internal workers, there is no immediate prospect for ratification of the Convention which requires bringing them under domestic labour law, and expanding labour inspection services.<sup>58</sup>

Another issue relevant to the Government–CMW interaction is recognition of the competence of the Committee by the state party in regard to the inter-state complaint mechanism (article 76) and the individual complaints procedure (article 77). This has been raised by the CMW in both the 2009 Concluding Observations and the List of Issues prior to the submission of Sri Lanka's second periodic report. Only four state parties (Mexico, Guatemala, El Salvador and Uruguay) have made the declarations provided for in article 77 recognising the competence of the Committee to receive communications from individuals. These mechanisms have therefore not yet come into force in the absence of the minimum ten declarations. Therefore, Sri Lanka falls into the majority of

56 n 21 above, 10.

57 n 46 above.

58 Interview with Senior Asst Secretary (Foreign Relations), Ministry of Labour and Trade Union Relations. See also Esufally 'Sri Lanka: Domestic workers – An analysis of the legal and policy framework, decent work for domestic workers report no 1' (2015).

state parties who have not recognised the competence of the CMW in regard to both articles 76 and 77.

There is a related precedent in Sri Lanka in regard to the Optional Protocol to the International Covenant on Civil and Political Rights (ratified by Sri Lanka in 1997), which makes it unlikely that Sri Lanka would make a declaration recognising the competence of the CMW under articles 76 and 77. The Sri Lanka Supreme Court ruled in 2006 that the UN Human Rights Committee had no judicial power under the Sri Lankan Constitution in the case of *Singarasa v Attorney General*<sup>59</sup> in relation to the aforementioned Optional Protocol. The Supreme Court maintained that Sri Lanka was a 'dualist state' in which treaty law does not automatically become law in the internal legal order of Sri Lanka, unless such treaty is transformed into the domestic law.<sup>60</sup> The Supreme Court ruled in this case that while the accession of Sri Lanka to the ICCPR bound the state at international law, it created no additional rights as recognised in the ICCPR for individuals within the jurisdiction of Sri Lanka in the absence of domestic legislation. The Supreme Court also highlighted that the accession by the President of Sri Lanka to the First Optional Protocol to the ICCPR, which allows individuals to address complaints of violations of ICCPR rights to the Human Rights Committee, was unconstitutional. This interpretation has, however, been subject to contention.<sup>61</sup>

## 6.2 Interaction of civil society with the Committee on Migrant Workers

As noted above, civil society did not play any major role in the ICRMW accession decision unlike in the case of Bangladesh. In Sri Lanka, advocacy on migrant issues is carried out by a number of trade unions and non-governmental organisations. The Migrant Service Centre under the trade union Ceylon Workers Congress and the Migrant Workers Front under the National Trade Union Federation (NTUF) represent trade union initiatives.<sup>62</sup> The Action Network for Migrant Workers (ACTFORM) formed by the Women and Media Collective, the Law and Society Trust, and the Migrant Forum Lanka represent major non-governmental organisations working on migrant issues and rights. There are also international NGOs such as the Solidarity Centre and CARITAS with national level offices. There are, however, no national level associations of migrant workers themselves. The MFEPW promoted a migrant workers foundation called 'Rata Viruwo' (which means 'Expatriate Heroes') – a grass roots level network – which had the potential

59 *Singarasa v Attorney General* C Spl (LA) No 182/99; SCM (15th September 2006).

60 DL Mendis 'An analysis of the Singarasa Case' *The Island* 27 October 2006.

61 Mendis (n 60 above); K Pinto-Jayawardena 'Will international treaties protect human rights in Sri Lanka?' (2013) 2 *Advancing Together* 4.

62 See Gunawardena (2014) for a detailed review of trade union action related to migrant workers in Sri Lanka.

to represent migrant workers, but it is no longer supported by MFE due to its perceived excessive politicisation.

Both the trade union movement and NGOs were active in the discussion preceding Sri Lanka's initial report to the CMW. Civil society also submitted a Shadow Report on the implementation of the ICRMW by Sri Lanka. It highlighted some of the more serious violations of the rights of Sri Lankan migrant workers overseas:

[A]buse and exploitation of migrants, violations of their terms of employment, lack of facilities to exercise their voting rights, right to freedom of movement, the role of consular and diplomatic missions, institutional mechanisms set up to deal with migrant workers, access to training and access to information.<sup>63</sup>

Regarding consultation with civil society, NGOs in their 2009 Shadow Report clarified their point of view:

Informal networking takes place between the SLBFE and civil society at seminars and training programmes organised both by the state and non state sector. Co-operation between civil society and the state is piecemeal and sporadic with no formal mechanism in existence to promote such cooperation.<sup>64</sup>

A communication by Migrant Forum Lanka to the CMW in 2013 also referred to lack of adequate visibility in legislative amendments and policies:

There is a severe lack of adequate visibility and publicity given to the processes of legislative amendments and drafting of policies, as well as implementation of activities promoting the rights of migrant workers and their families. Even though the state has initially consulted a few selected members of civil society and local stakeholders in the latest process of amending the SLBFE Act 56 of 2009, none of the stakeholders were informed about the final draft amendments to the law.<sup>65</sup>

The CMW has encouraged Sri Lanka to involve civil society organisations in the preparation of its second periodic report.<sup>66</sup> The List of Issues prior to the submission of Sri Lanka's second periodic report asked for information on 'the mechanisms put in place by the State party to consult and involve migrants, migrant rights groups and other relevant NGOs in the design and implementation of policies on migration'.<sup>67</sup>

63 ACTFORM & WMC 'Sri Lanka NGO Shadow Report on the International Convention on the Protection of the Rights of All Migrant Workers' and their Families' (2008) 5.

64 ACTFORM & WMC (n 63 above) 26.

65 MFL (n 27 above) 2-3.

66 n 21 above, 9; n 50 above.

67 n 50 above, 1.

It also raised the pertinent question whether migrant rights groups are represented on the Board of Directors of the Sri Lanka Bureau of Foreign Employment (SLBFE) and if not, to describe how the state party ensures that their voices are adequately represented in the SLBFE. It is an obvious anomaly that four members of ALFEA are represented on the SLBFE Board while neither unions nor NGOs/migrant associations are represented. Since the SLBFE is entrusted with regulation of recruitment agencies, this leads to an obvious conflict of interest. This issue has not been addressed in the 2012 revision or the draft Sri Lanka Employment Migration Authority Act, which surprisingly contains no single reference to NGOs, civil society or social partners. The Joint CSO submission to the 2016 CMW proposed the inclusion of representatives of civil society mandatory for the Board of Directors of SLBFE.<sup>68</sup>

One mechanism for interaction is in the National Advisory Committee on Labour Migration established in 2010 by the Ministry of Foreign Employment Promotion and Welfare. It is a follow up to the National Labour Migration Policy recommendation, and has provision for representatives of two NGO representatives and a trade union. The National Advisory Committee is chaired by the Minister. Although it is scheduled to meet twice a month, actual meetings have been less frequent. For example, the Committee had not met even once by August 2016, following the regime change in January 2016. This makes the following statement in 2016 in Sri Lanka's second periodic report highly misleading:

'Since the National Advisory Committee on Labour Migration comprises all key stakeholders including NGOs, voice of the migrant workers is adequately represented at decision & policy making level'.<sup>69</sup> It is only an advisory body which has no decision making powers. The shadow report of the National Christian Council of Sri Lanka has described the Advisory Committee as a 'very loose, unrecognized body lacking any power for action'.<sup>70</sup>

The author's attempt to consult civil society organisations in connection with the present study did not succeed due to lack of any response or cooperation from those contacted such as the Action Network for Migrant Workers (ACTFORM) and the Women and Media Collective. This made it difficult to get first-hand information on civil society perspectives on the current situation. While the CMW expected civil society to work together with the government on the second report, local civil society groups seem to have focussed on their shadow reports<sup>71</sup> without any coordination among themselves.

68 Shadow Report on Sri Lanka jointly submitted by 20 CSOs (2016) (n 54 above).

69 n 46 above, 9.

70 NCC (n 54 above) 8.

71 Sri Lanka NGO Shadow Report 2016 (n 54 above); Shadow Report on Sri Lanka jointly submitted by 20 CSOs (2016) (n 54 above); NCC (n 54 above).

## 7 Major areas of concern

### 7.1 Provision of information

Article 33 of the ICRMW provides for the right of migrant workers to be informed by the state of origin, the state of employment or the state of transit, as the case may be, concerning: their rights arising out of the Convention; and the conditions of their admission, their rights and obligations under the law and practice of the state concerned and such other matters as will enable them to comply with administrative or other formalities in that state. Such information should be provided free to workers and members of their families.

The NGO Shadow Report to the CMW in 2008 highlighted gaps in this context:

No specific measures are being taken by government to disseminate and promote the Convention. The SLBFE and its branch offices take on the role of disseminating information to prospective migrants as part of their mandate.<sup>72</sup>

One obvious gap is the virtual absence of publicity given to the Convention. The Safe Labour Migration Information Guide of the SLBFE does not make any reference to the ICRMW.<sup>73</sup> Moreover, there is no evidence that the ICRMW and the related General Comment 1 on migrant domestic workers and General Comment 2 on the rights of migrant workers in an irregular situation have been translated into Sinhala and Tamil for dissemination. It is important to translate the ICRMW and the two General Comments into the two national languages for wide dissemination to stakeholders and especially migrant workers and their families. Indeed, even the English version of the ICRMW has not been placed on the website of the key agencies: the Ministry of Foreign Employment, Ministry of Foreign Affairs and the SLBFE.

Sri Lanka has made more progress in regard to dissemination of information on migration in safe and dignified conditions. The SLBFE has carried out safe migration sensitisation programmes in collaboration with the ILO and a number of NGOs using its SLMIG. The emphasis has been on training of Migration Development Officers (MDOs) as potential trainers who are based in the field at divisional secretariat level. In turn MDOs conduct awareness sessions for prospective migrants. Other government officers (not mandated with migration issues) also use their field visits as a means to convey advice and information on safe migration to community members. Thus, safe migration information is now said to

<sup>72</sup> ACTFORM & WMC (n 63 above) 26.

<sup>73</sup> GMPA (2016).

be mainstreamed in discussions on women's development, child rights promotion, and livelihoods and welfare (Samurdhi) at the village level.<sup>74</sup> The SLMIG has now gone through a second edition based on feedback from field officers. An international NGO, Helvetas Swiss Intercooperation, is also collaborating by implementing a project on safe labour migration at the grassroots level in Sri Lanka on behalf of the Swiss Agency for Development and Cooperation.<sup>75</sup> The SLMIG does not, however, contain any information on the ICRMW and how migrant workers can benefit from it. Whether briefing on the ICRMW is incorporated into the training courses for MDOs is also not known.

## 7.2 Voting rights of migrant workers

The CMW had raised the issue of voting rights for migrant workers in its 2009 Concluding Observations and also the List of Issues to be addressed in Sri Lanka's second periodic report. In this context it is worth noting that the Chairman of the National Workers Congress wrote to the Elections Commissioner on 4 January 2010 on voting rights for migrant workers and other Sri Lankans resident abroad stating that:

At a time when Sri Lankan authorities are making every effort to enlist support of the Sri Lankan Diaspora living abroad to participate in nation building, it also becomes a national responsibility to enlist non resident Sri Lankans in the political process.<sup>76</sup>

The Action Plan of the Human Rights Commission of Sri Lanka addresses this issue under focus area 11.1, specifically as the right to vote ensuring franchise of migrant workers and the responsibility given to the Commissioner of Elections Department to make recommendations to the state.<sup>77</sup> A further Action Plan was foreseen to conduct a study on the absentee balloting systems in other countries and make proposals on a suitable system to be adopted by Sri Lanka. However, there is no indication that such a study has been conducted for use by Sri Lanka. The Action Plan aimed for according this right by 2016 through postal voting rights or other mechanism,<sup>78</sup> which was hardly feasible in the absence of any follow up action on the part of HRCSL.

74 Information supplied by Ms Swairee Rupasinghe, ILO Office, Colombo.

75 HELVETAS 'Safe and beneficial labour migration for Sri Lankan migrant workers' (2014).

76 MSC-NWC 'Migrant news letter' (2010) 12.

77 n 22 above.

78 P Mahanamahewa 'Migrant workers' voting rights' *Sri Lanka Daily Mirror* 6 January 2015.

While the MFE at present is considering voting rights as a priority, the Minister of Foreign Employment has mentioned that voting rights for Sri Lankan migrant workers would be possible within the next five years.<sup>79</sup> According to Sri Lanka's second periodic report, no progress had been made as of May 2016.

### 7.3 Consular support

The ICRMW emphasises the role of consular officials in providing services to migrant workers. Sri Lanka has had a long tradition of appointing labour attachés to important destination countries to serve migrant workers. Recently the government has introduced a manual for Labour Sections of Diplomatic Missions<sup>80</sup> and provided related training to diplomatic staff. However, the training has not been repeated for new staff. Strangely this handbook refers only to the Vienna Convention and does not contain a reference to the ICRMW. There is no information whether separate orientation is provided on the ICRMW. The SLMIG provides information on contacts abroad for migrant workers. Some of the missions operate safe houses for runaway migrant workers especially female domestic workers. What is missing, however, is a one country team approach like that provided by the Philippines. The latter has also promoted migrant resource centres at embassies including hotlines and legal support.

It is also worth pointing out that civil society has been critical that some of the appointments to the overseas diplomatic missions are primarily political and not based on merit. This significantly undermines the support that can be provided to migrant workers.<sup>81</sup>

### 7.4 Irregular migration

Sri Lanka has made irregular migration a criminal offence which is not consistent with the ICRMW. As the Special Rapporteur on the human rights of migrants has pointed out, it should be treated as an administrative offence.<sup>82</sup> There are no accurate estimates of irregular migration from Sri Lanka or into Sri Lanka. The total numbers of Sri Lankan citizens in irregular status in EU member states had increased from 3530 to 4475 between 2009 and 2011. The numbers ordered to leave also increased between the two years with over 5 500 ordered to leave in 2011. The largest numbers (though numerically small) were in the UK followed by

79 I Mudugamuwa 'Voting rights for Sri Lankan migrant workers' *Daily News* 8 October 2015 <http://www.dailynews.lk/?q=2015/10/08/local/voting-rights-sri-lankan-migrant-workers> (accessed 3 November 2017).

80 MFEPW (n 53 above).

81 Shadow Report on Sri Lanka jointly submitted by 20 CSOs (2016) (n 54 above).

82 Crépeau (n 20 above).

Germany, France, and Greece in 2011.<sup>83</sup> Sri Lanka has entered into a readmission agreement with the EU in 2004 although specific protocols have taken much longer to develop.

Following the termination of conflict in 2009, there has been a surge in irregular movements to Australia by boats, especially by members of the Tamil community. Most of the irregular movements to a wide range of countries took place during the conflict period to escape from the fighting as well as to seek better economic opportunities. It is difficult to understand the surge in irregular movements, especially towards Australia, following restoration of peace. As the Sri Lankan government has rightly pointed out, the lack of economic opportunities and livelihood is common to all communities in Sri Lanka, and is not confined to any specific ethnic group. Traffickers and smugglers are probably able to operate more freely now, and provide false information to encourage people to leave.<sup>84</sup> The Australian High Commission quoted the figure of 1346 Sri Lankans having landed in Australia illegally in the first six months of 2012. According to the High Commission, persons arriving illegally by boat from Sri Lanka had been much lower in previous years – 211 (2011), 536 (2010) and 736 (2009).<sup>85</sup> Sri Lanka has entered into a readmission agreement with Australia, and is under an obligation to deter irregular movements from the country.

Returned asylum seekers are taken into custody and must appear in court, and are usually fined for the offence of leaving the country illegally. In early May 2016, for example, a group of 12 persons returned by Australia from Cocos Island were arrested and taken into custody by Sri Lankan police.<sup>86</sup> The Special Rapporteur also has highlighted the detention of migrants in irregular status for long periods by Sri Lankan authorities in 2014. He has recommended the decriminalisation of irregular departures from Sri Lanka, and refraining from detaining returned Sri Lankans who have migrated irregularly. There is no evidence that this recommendation has been followed up by the authorities.

## **7.5 Protecting migrant workers through bilateral agreements and MOUs and regional consultative processes.**

Sri Lanka has managed to sign a number of bilateral MOUs with GCC countries and Jordan. None of these MOUs, however, refer to international instruments and only a very few mention protection of rights

83 P Wickramasekara 'Much ado about nothing: Reflections on irregular migration' (2013).

84 Wickramasekara (n 83 above).

85 Sources cited in Wickramasekara (n 83 above).

86 B Doherty 'Asylum seekers deported from Cocos Islands arrested by Sri Lankan police' *The Guardian* 7 May 2016

of migrant workers as an objective.<sup>87</sup> Research by the author has highlighted the lack of transparency, omission of critical issues such as recruitment and confiscation of passports, and lack of effective follow-up and enforcement as major issues to be addressed in the context of such MOUs.<sup>88</sup>

The CMW in its 2009 Concluding Observations urged the government to:

Continue its efforts to negotiate bilateral agreements on labour migration with major labour-receiving countries in order to secure protection of the rights of migrant workers and to progressively and verifiably mainstream relevant and appropriate provisions of the Convention into these agreements.<sup>89</sup>

In practice however, this depends on the cooperation of destination countries, none of which have ratified international migrant worker conventions.

Sri Lanka participates in two regional consultative processes: the Colombo Process of ministerial consultations of countries of origin where it acted as the Chair from 2013-2017 and the Abu Dhabi Dialogue which includes both Asian origin countries and GCC countries and carries more weight. The Colombo Process has made only modest achievements over the years, and the focus of the Abu Dhabi Dialogue is on less controversial issues such as skills recognition, pre-departure orientation and recruitment practices.<sup>90</sup> The author did not find any reference to the ICRMW in their recent declarations or reports of meetings.

## 8 Conclusion

The above analysis highlights the large unfinished agenda in ensuring that migration for decent and productive employment occurs in conditions of freedom, equality, security and human dignity as envisaged in the National Labour Migration Policy of 2008. While Sri Lanka has developed a mature migration administration system over the last three to four decades, it is faced with a number of major constraints, namely, its role as an origin country, the predominance of low skilled migration, concentration of migration flows into GCC countries, control of the

87 LK Ruhunage 'Consolidated Report on Assessing Labour Migration related Bilateral Agreements (BLAs), Memorandum of Understandings (MOUs) and other similar arrangements in the Asian region' (2014).

88 P Wickramasekara 'Bilateral Agreements and Memoranda of Understanding on migration of low skilled workers: A review' (2015).

89 n 21 above, 7.

90 P Wickramasekara 'South Asian migration to the Gulf: A safety valve or a development strategy?' (2015) *Migration and Development* 1.

migratory process largely by the private sector and lack of rapid local economic development.

It is clear that Sri Lanka has so far not made any serious attempt to harmonise national legislation with the ICRMW. The Sri Lanka National Action Plan for the Protection and Promotion of Human Rights, 2011-2016, spelled out actions for amending national laws and policies to bring them in line with the Convention, but it has failed to deliver on this target. There is broad consensus in civil society reports relating to Sri Lanka's second periodic review by the CMW that the standards of the ICRMW should be incorporated into national legislation.<sup>91</sup>

One redeeming feature is that a rights based approach was followed in the elaboration of the National Labour Migration Policy<sup>92</sup> with protection and empowerment of migrant workers being one of the three main pillars of the policy and related action plan. With the support of international organisations such as the ILO, important strides have been made in the implementation of policies relating to major areas of concern. The ILO has also tried to promote ILO migrant worker conventions as well as adherence to the ICRMW.<sup>93</sup> Sri Lanka is also more conscious of the gaps between policy, law and practice in regard to labour migration issues through its interaction with the CMW, amongst others.

Priorities for improvement of law and practice would lie in several areas. The revision of the SLBFE Act should be undertaken with emphasis on aligning it with the provisions of the ICRMW and focusing on protection of women and men migrant workers as the main objective. A major restructuring of the SLBFE would be useful to make it more focused on protection issues and service delivery to migrant workers and their families. Discriminatory measures against women migrants such as the Family Background Report needs to be urgently reviewed and replaced with credible alternatives. It is encouraging to note that the Minister has announced reviewing the Family Background Report with a view to its abolition.<sup>94</sup> Serious attention needs to be given to reviewing the situation of foreign workers in Sri Lanka and adopting relevant legislation for their protection.

At the same time, development strategy and policy in Sri Lanka should also focus on generating decent work opportunities, especially for women

91 Sri Lanka NGO Shadow Report (n 54 above); GMPA (2016); Shadow Report on Sri Lanka jointly submitted by 20 CSOs (2016) (n 54 above).

92 MFEPW (n 8 above).

93 The Colombo ILO Office organised a National Tripartite Workshop on International Instruments for the Protection of Migrant Workers: Sri Lanka, Colombo on 26 July 2004 to promote the two ILO Conventions and the ICRMW where the author acted as a resource person. The ILO/SDC technical cooperation projects have pointed out the need for compliance with the ICRMW in several interventions.

94 C Dissanayake 'Ministry to abolish FBR from female migrant workers' *The Ceylon Daily News* 25 December 2015.

migrant workers, inside the country to ensure that migration takes place by choice rather than need.