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**Situation and gap analysis on  
Malaysian legislation, policies, and programmes  
and the ILO Forced Labour Convention and Protocol**



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## ACRONYMS

ATIPSOM	:	Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007
Bridge	:	From Protocol to Practice: A Bridge to Global Action on Forced Labour Project
CAS	:	Committee on the Application of Standards
CEACR	:	Committee of Experts on the Application of Conventions and Recommendations
CPTPP	:	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CSO	:	Civil society organization
FOMEMA	:	Foreign Workers' Medical Examination
G-to-G	:	Government-to-government
ILO	:	International Labour Organization
IRA	:	Industrial Relations Act
LAB	:	Legal Aid Bureau
LAC	:	Legal Aid Center
MAPO	:	Anti-Trafficking in Persons and Anti-Smuggling of Migrants Council
MEF	:	Malaysian Employers Federation
MOHR	:	Ministry of Human Resources
MOU	:	Memoranda of Understanding
MTUC	:	Malaysian Trade Union Congress
NAP	:	National Action Plan
NAP-TiP	:	National Action Plan on Anti-Trafficking in Persons
Roadmap	:	Roadmap towards Ratification of the Forced Labour Protocol
SETF	:	Special Enforcement Task Force
SUHAKAM	:	Human Rights Commission
VDR	:	Visa with Reference
VP(TE)	:	Visit Pass (Temporary Employment)
WCA	:	Workmen's Compensation Act

## 1 Executive summary

Malaysia is a signatory to various international human rights instruments, including the ILO fundamental Convention on Forced Labour (C29) which the country ratified in 1957. The Forced Labour Protocol (P29) that supplements ILO C29 is yet to be ratified by the country. P29 tackles issues that are relevant to Malaysia and emphasizes prevention and suppression of trafficking and forced labour, protection of victims, and improving their access to legal remedies.

In recent years, the Malaysian government has shown increasing interest in carrying out initiatives leading towards greater compliance with its international obligations on trafficking and forced labour, most visibly through its efforts against trafficking in persons. This study on the “Situation and Gap Analysis on Malaysian Legislation, Policies, and Programmes and the ILO Forced Labour Convention and Protocol” takes stock of the progress made on forced labour, and highlights the remaining gaps to enable the future development of comprehensive policies and programmes towards the elimination of forced labour and the onward ratification of P29.

The importance of this Gap Analysis on understanding how different policies and legislation impact forced labour in Malaysia cannot be understated. Nevertheless, it is not designed to be fully exhaustive given its scope and methodological limitations. Importantly, it provides key findings and recommendations that provide guidance towards alignment of the national legislation, policies and programmes with the ILO C29 and P29, and that the Malaysian Government can follow through as part of its priorities.

This Gap Analysis is supported through the ILO Project “From Protocol to Practice: A Bridge to Global Action on Forced Labour” with funding support from the US Department of Labor. This global project aims to increase countries’ ability to address forced labour through increased knowledge, awareness, and ratification of the ILO Protocol and Recommendations; improved and responsive policies and action on forced labour with strong implementation, monitoring, and enforcement mechanisms; increased efforts to collect reliable data; and strengthened tripartite actions to address forced labour.

Data was collected through desk-based research and interviews of relevant stakeholders on country context, challenges and opportunities for addressing the gaps and contradictions of legal mechanisms relevant to forced labour. To determine how the legislation and policies are applied in practice, case law and case information shared by civil society organizations (CSOs) were also reviewed. The study was conducted during the period January to September 2018.

The findings are presented under the usual understanding that the International Labour Office has no authority under the Constitution of the International Labour Organization to provide interpretations of the instruments adopted by the International Labour Conference or to assess the conformity of national law and practice with these instruments, and without prejudice to comments that may be made by the competent ILO supervisory bodies.

## Key findings and recommendations

The analysis takes note of positive measures that Malaysia has put in place in recent years in its efforts to improve its legal framework to prevent and address labour exploitation, forced labour and trafficking. Efforts include the recent amendments to the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM), Private Employment Agencies Act and levy policy, and the proposed amendments to the Employment Act indicative of a move towards a more dynamic counter-exploitation effort for the Malaysian Government.

The Committee of Experts on the Application of Conventions and Recommendations, in its Observation published during the 106<sup>th</sup> ILC session (2017) urged the Government to take the necessary measures to ensure that migrant workers are fully protected from abusive practices and conditions that amount to the exaction of forced labour. In this regard, it urged the Government to take specific measures to respond to cases of abuse of migrant workers and to ensure that victims of such abuse are able to exercise their rights in order to halt violations and obtain redress. It also requested the Government to take concrete action to identify victims of forced labour among migrant workers and to ensure that these victims are not treated as offenders. Moreover, noting an absence of information in the Government's report on any prosecutions undertaken, the Committee urged the Government to take immediate and effective measures to ensure that perpetrators are prosecuted and that sufficiently effective and dissuasive sanctions are imposed.

This gap analysis report has identified the following main gaps between the content, application and implementation of Malaysia's policies and legislation vis-à-vis the provisions and application of the ILO Forced Labour Convention and Protocol, as well as opportunities to build on the existing mechanisms to address these gaps:

**LEGAL DEFINITIONS AND SANCTIONS:** There are forced labour cases that do not meet the current threshold of ATIPSOM, and other national laws fall short of penalizing forced labour with appropriate sanctions as called for in ILO C29. The definition of coercion in ATIPSOM is narrow and not in keeping with the realities of modern forms of exploitation where there is a distinct prevalence of elements such as psychological coercion, deception, fraud and abuse of vulnerabilities. In practice, coercion as defined in ATIPSOM can be very hard for the prosecution to prove. Broadening the "means" element of trafficking to include more than coercion will provide a better opportunity to combat forced labour exploitation in all its forms.

The Penal Code criminalizes those who "unlawfully compel any person to labour against the will of that person". Such provision is not used in practice to deal with forced labour cases because of its lenient penalty and would require a revision of its terms so it is commensurate with Malaysia's obligations of penalizing forced labour under the ILO Convention 29.

Forced labour as a specific offense is introduced in the proposed amendments to the Employment Act, which shows the government's recognition that some forced labour cases fall outside the ambit of trafficking. The ILO invites the Ministry of Human Resources (MOHR) to ensure coherence with the provisions of the Penal Code and ATIPSOM.

**BALANCING POWER BETWEEN EMPLOYER AND EMPLOYEE:** Various systemic vulnerabilities give rise to an asymmetry of power between employers and employees which often leads to exploitation in the form of forced labour. For example, the employer-led process of work permit renewal impedes the right of the workers to change employment in the event of abuse for fear of becoming undocumented. The law could also provide stronger accountability for employers on failure to undertake administrative processes to ensure workers remain documented.

Poor enforcement of legislation prohibiting passport retention also compounds the problem. It is recommended to develop implementing regulations to address current gaps in the enforcement of

and awareness raising on Passport Act. Provision of higher fines and more serious consequences for repeat offenders could also help deter the practice of passport retention.

**FREEDOM OF ASSOCIATION:** Freedom of association is particularly important for migrant workers, to reduce their vulnerability to forced labour, given the imbalance of power between employers and employees. The opportunity to formulate and air grievances collectively is an important step towards accessing a remedy. Many migrant workers are employed in the informal sector such as domestic work, which is not recognized as a form of work under the existing Employment Act 1955.

**SCOPE OF LEGAL PROTECTION:** The exploitation of vulnerability of workers who do not benefit from legal protection under Malaysian law perpetuates forced labour. Removing exclusions for domestic workers in the Employment Act for example will be critical for their protection from labour abuses. Implementation of the Immigration Act vis-à-vis other laws such as ATIPSOM and labour laws should take into consideration that it must not discourage any workers - regardless of legal status – from reporting grievances or abuses committed by their employers, which could result in the continuation or aggravation of exploitation. The Workers' Minimum Standards of Housing and Amenities Act should be amended to cover relevant sectors beyond estate and mining, allow freedom of movement of workers and provide for safe and fully-accessible storage for workers' legal documents and valuables, including passports.

**ENFORCEMENT:** Increasing the allocation of resources for the labour inspectorate is essential to improve enforcement while also enhancing its strategic approach in managing compliance with labour laws. Synergies with other stakeholders could also be formed and leveraged thereby allowing the current labour inspection process to increase its effectiveness, reach vulnerable workers and target sectors that are remote and isolated. A higher number of unannounced inspections would also serve as a deterrent for unscrupulous employers who use exploitative employment practices. Enforcement agencies, including the Police and Immigration need to have clearer guidelines and illustrations in relation to detection of forced labour cases, supported by an efficient, responsive and trustworthy case management system.

Zero-levy fees for workers is a welcome move but strict regulations have to be implemented to ensure that this cost is not passed on by employers to the workers through salary deductions. In the absence of digitised payments, it is extremely challenging to monitor payments made to workers in order to ensure that they are not being subjected to illegal deductions. At the same time, ensuring that recruitment costs paid by employers are lowered is also important.

The government may wish to develop the implementing regulations of the Passport Act to address the current gaps in enforcement and awareness requiring the employers to post notices about workers' rights to keep their passports and providing higher penalties for repeat offenders.

**ACCESS TO LEGAL REMEDIES:** Victims of forced labour often have limited knowledge about their rights and have difficulty accessing legal aid which increases their vulnerability to situations of abuse. Addressing forced labour requires providing vulnerable workers with education about their rights and access to justice. Access to justice remains weak for workers who are migrants, refugees, asylum-seekers and stateless persons in Malaysia. With restrictions on state-funded legal aid, these workers rely on the support of the Malaysian Bar, MTUC and the NGOs.

The government could look into the possibility of waiving fees associated with pass to remain in Malaysia and seek alternative employment, provided through the Labour Department for foreign workers who are involved in any labour violation.

For forced labour cases tried under ATIPSOM, compensation is discretionary, therefore not always guaranteed. When forced labour cases don't meet the threshold for trafficking, they are often treated as sub-standard working conditions. In respect of which compensation can be inadequate in

the event of life changing injuries and it does not adequately provide for any ensuing psychological damage and/or loss of opportunity. Furthermore, a pay-out pursuant to the Workers' Compensation Act would preclude a victim from initiating civil proceedings against the employer. Victims of forced labour who choose to bring a case pursuant to labour laws rather than the ATIPSOM due to its high evidentiary threshold are often limited to claiming for unpaid wages rather than damages for loss and harm suffered. Unlike ATIPSOM, labour laws do not provide protection for victims from criminalisation that might occur as a direct result of exploitation.

**COLLABORATION:** Multiple efforts are being made by government agencies, trade unions, employers' organizations, and CSOs to counter trafficking and promote workers' rights however different institutions are often operating in silos. At present there is inadequate engagement by the private sector in the efforts to combat forced labour and human trafficking. This is particularly troubling given that working and living conditions, passport retention, wage payment, work permit renewals and outsourcing of services are all employer-controlled. Finally, deception and debt often originate in countries of origin and unless there is a concise and sustained effort to engage with governments in these countries to address these vulnerabilities, Malaysia's efforts to combat forced labour will remain incomplete. Stipulating the responsibilities of both countries of origin and destination in preventing and addressing forced labour in bilateral and multilateral agreements is a concrete action that could be taken in this regard.

**NATIONAL ACTION PLAN ON FORCED LABOUR:** The National Action Plan (NAP) on Trafficking is acknowledged as a good starting point for developing a much more comprehensive plan on forced labour (a sub-NAP), that could leverage on the established structure, monitoring and implementation mechanism and resource allocation in relation to trafficking.

**RATIFICATION OF FORCED LABOUR PROTOCOL:** The new government's Manifesto sets out its aim to "ensure protection of workers' rights is at par with international standards and which adhere to conventions established by the International Labour Organization (ILO)". In line with this, Malaysia could consider ratifying the ILO Forced Labour Protocol, or developing a roadmap towards ratification, based on this Gap Analysis. Having ratified ILO Convention 29, the ratification of the supplementary Protocol is ideal inasmuch as it gives effect to the Malaysian-ratified Convention's obligation to suppress forced labour. Notwithstanding the need to enhance functionality and scope, important mechanisms are already in place that respond to the Forced Labour Protocol's provisions on measures for prevention of forced labour, protection of victims, access to legal remedies and international cooperation. Ratification is an opportunity to gain international visibility for the Government's efforts to improve its laws, policies and practices in this regard.

## 2 Background

Malaysia is a signatory to various international human rights instruments, including the ILO fundamental Convention on Forced Labour (C29) which the country ratified in 1957. In 2016, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), in its Observations on Malaysia's application of C29 recognized the measures taken by the Government to protect migrant workers but noted, with deep concern, the continued abusive practices and working conditions of migrant workers that may amount to forced labour.

The Forced Labour Convention, 1930 (No.29) defines forced labour as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."<sup>1</sup> By ratifying C029, Malaysia has committed to "suppress[ing] the use of forced or compulsory labour in all its forms within the shortest possible period."<sup>2</sup> C029 also requires ratifying States to ensure that the use of forced labour is punishable as a penal offence and that penalties are really adequate and strictly enforced. The Convention also identified specific exemptions.<sup>3</sup>

The ILO adopted a second convention on forced labour, Abolition of Forced Labour Convention, 1957 (No. 105), which does not revise Convention No. 29 but aims at complementing it by focussing on prohibition of forced labour exacted as punishment for the expression of political views, for the purposes of economic development, for participation in strikes, as a means of racial or other discrimination or as labour discipline. Convention No. 105 primarily concerns forced labour imposed by state authorities. Malaysia ratified the Convention on 13 Oct 1958 and denounced it on 10 January 1990 "due to divergences with the ILO in the interpretation of national legislation with regard to this Convention"<sup>4</sup>.

The Protocol to the Forced Labour Convention, adopted in 2014, is a legally-binding instrument that requires States to take measures regarding prevention, protection and remedy in giving effect to the Convention's obligation to suppress forced labour. It supplements the Forced Labour Convention, 1930 (No. 29), so only ILO member States that have ratified the Convention, including Malaysia, can ratify the Protocol. The Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203) provides non-binding practical guidance in the areas of prevention, protection of victims and ensuring their access to justice and remedies, enforcement and international cooperation. It supplements both the Protocol and the Convention.

The Protocol and Recommendation complement and strengthen existing international law, including the UN Slavery Convention of 1926, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956 and the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. These instruments have

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<sup>1</sup> ILO: *C029 - Forced Labour Convention, 1930 (No. 29)*, International Labour Conference, 14<sup>th</sup> Session, Geneva, 1930,, Article 2.

<sup>2</sup> *Ibid.*, Article 1.

<sup>3</sup> *Ibid.*, Article 2(2) provides that for the purposes of the Forced Labour Convention 29, the term forced or compulsory labour shall not include-- (a) compulsory military service for work of a purely military character; (b) normal civic obligations of the citizens of a fully self-governing country; (c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations; (d) any work or service exacted in cases of emergency; (e) minor communal services in the direct interest of the said community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

<sup>4</sup> ILO: *Malaysia Country Baselines under the ILO Declaration Annual Review (2000-2008): Elimination of all forms of forced or compulsory labour*, 2008.

contributed to widespread prohibitions of slavery, forced labour and human trafficking practices. However, the scale of the problem suggests a need for new strategies, including a focus on prevention, for instance through measures that strengthen the proactive role of labour inspections and workers' and employers' organizations. The greater emphasis on protection and access to remedies brought by the Protocol will also help to ensure that the human rights of victims are respected and that perpetrators are more effectively punished.

Malaysia is yet to ratify the Forced Labour Protocol - providing guidance toward ratification and application of the Protocol is a key objective of this Gap Analysis.

The ILO project "From Protocol to Practice: A Bridge to Global Action on Forced Labour" (Bridge Project) aims to strengthen global and national efforts to eliminate forced labour under the 2014 Forced Labour Protocol and its accompanying Recommendation 203. The project is designed to work with the Malaysian Government, workers' and employers' representatives, and CSOs to increase knowledge, awareness, and ultimately achieve ratification of the ILO Protocol in the country; improve and develop responsive national policies, legislation; and an action plan on forced labour; increase efforts to collect reliable data in order to carry out research; share knowledge across institutions at a national level; and strengthen workers' and employers' organizations to support the fight against forced labour in partnership with other interested parties.

As communicated by the ILO to government and other members of the Technical Review Group for this study, this gap analysis will feed into the Roadmap towards Ratification of the Forced Labour Protocol (Roadmap) and a sub-National Action Plan (sub-NAP) on forced labour under the NAP on trafficking. These initiatives will provide direction to the country on how it could proactively address forced labour issues. The Roadmap and the NAP are essential tools for policy and programming toward eradication of forced labour in the country. Given the strong focus on counter-trafficking in Malaysia and the increase in related investigations and prosecutions, it is acknowledged that a more holistic approach to the issue of exploitation requires a more comprehensive understanding of forced labour and means of combating it. The Roadmap and NAP will most certainly provide a more structured approach to the issue of exploitation by forced labour in Malaysia.

## **2.1 Research objectives**

This "Situation and Gap Analysis on Malaysian Legislations, Policies, and Programmes and ILO Forced Labour Convention and Protocol" was commissioned to identify the gaps and contradictions in existing legislation, policies and programmes, including enforcement and implementation practices giving effect to such mechanisms. It also aims to identify the actions needed to address these gaps that will guide the country toward compliance with ILO C29 and the future application of the Forced Labour Protocol. This study also recommends which of the gaps or contradictions the government may wish to address as part of the Forced Labour NAP and provide recommendations on key milestones for the Roadmap towards Ratification of Forced Labour Protocol.

## **2.2 Methodology and limitation of the analysis**

Extensive desk review was conducted about the scope, enforcement, implementation and application of existing national legislation, policies and programmes related to forced labour, including past reviews or assessments on the subject. Initial findings were then supplemented with interviews of relevant stakeholders about country contexts, challenges and opportunities for addressing the gaps and contradictions relating to mechanisms relevant to forced labour. The review included case law and sharing of case information from some CSOs, a process deemed important to

identify how legislation and policies are being applied in practice. The draft report was reviewed by a technical review group comprised of the government, and representatives from the Malaysian Trade Union Congress (MTUC) and the Malaysian Employers Federation (MEF), Human Rights Commission (SUHAKAM) and the Malaysian Bar Council on June 2018. The study was conducted during the period from January to September 2018.

The Consultants<sup>5</sup> for this study were only able to access publicly-available copies of legislation and case files. Some of the policies and standard procedures in the government were discussed verbally with the consultants and the ILO, but could not be verified through actual copies of the documents due to internal government policy on confidentiality.

It is to be noted that this Gap Analysis does not provide an interpretation of the instruments adopted by the International Labour Conference nor does it assess the conformity of national law and practice with these instruments. It does not prejudice the comments that may be made by the competent ILO supervisory bodies. However, the application of the relevant international standards are used as reference points for data analysis and recommendations in this Gap Analysis.

### **3 Analysis of forced labour situation in Malaysia**

This section examines the forced labour situation in Malaysia in terms of affected populations, characteristics and types of forced labour in order to establish what could be contributing to these groups' vulnerabilities relative to the content, extent of application and enforcement of Malaysian legislation, policies and programmes.

#### **3.1 Nature and extent of forced labour in Malaysia**

According to Global Estimates of Modern Slavery released by the ILO and the Walk-Free Foundation, 25 million people were victims of forced labour worldwide in 2016. Victims were being forced to work under threat or coercion as domestic workers, on construction sites, in clandestine factories, on farms and fishing boats, in other sectors, and in the sex industry. They were forced to work by private individuals and groups or by state authorities. In many cases, the products made and services provided end up in seemingly legitimate commercial channels. The prevalence of forced labour is highest in Asia and the Pacific where, according to the study, four out of every 1,000 people are victims.

The ILO CEACR noted in its 2016 observations for Malaysia the "vulnerable situation of migrant workers with regard to the exaction of forced labour, including trafficking in persons."<sup>6</sup> Migrant workers encounter forced labour<sup>7</sup> at the hands of employers and informal labour recruiters carrying out abusive practices. They are exposed to, high recruitment fees, wage arrears and contract

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<sup>5</sup> Consultants were Archana Kotecha and Sumitha Shaantinni Kishna

<sup>6</sup> *Committee of Experts on the Application of Conventions and Recommendations (CEACR) Observation -- Forced Labour Convention, 1930 (No. 29)*, ILO, 2017, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3279400:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3279400:NO) [accessed 30 September 2018].

<sup>7</sup> Indicators of forced labour derived from theoretical and practical experience of the ILO's Special Action Programme to Combat Forced Labour are: abuse of vulnerability, deception, restriction of movement, isolation, physical and sexual violence, intimidation and threats, retention of travel documents, withholding of wages debt bondage, abusive working and living conditions, and excessive overtimes without remuneration.

substitution, long working hours without additional remuneration, denial of rest days and leave, housed in unsanitary accommodation, and have their personal identification documents taken from them, exposing them to harassment and arrest by authorities.

Stateless persons – children and women in particular - are more vulnerable to human trafficking, gender-based violence and modern slavery as there is no government looking out for them. Many news reports point to the widespread use of child labour in Malaysian industries because of statelessness. According to a 2011 research published by the Finnish Embassy in Kuala Lumpur, titled *'Forced Labor, Human Trafficking and Mental Health: The Experiences of Refugees and Asylum Seekers in Malaysia'*, there were cases of refugees and asylum-seekers who were not paid their wages or were physically abused during employment<sup>8</sup>.

### **3.2 Groups and sectors particularly at risk**

Malaysia has benefitted greatly from the employment of migrant workers in several economically important sectors. During the last two decades, these workers have helped to provide the labour that has fuelled the country's emergence into an upper middle-income country.<sup>9</sup>

According to the 2016 ILO Review of Labour Migration Policy in Malaysia, Malaysia plays host to the largest number of migrants in Southeast Asia with a migrant workforce of 3-4 million that contributes to about 20 – 30% of the country's workforce. As much as half of this number are now thought to be undocumented and comprise migrant workers and domestic workers, stateless persons, refugees and asylum seekers and international students. There is no established data on undocumented migrant workers. On 30 June 2017, the then Minister of Home Affairs stated in a response to a Parliamentary question, that there were 1,781,598 documented migrant workers from 15 countries of origin.<sup>10</sup>

Workers migrate for a variety of reasons such as in search of better employment opportunities, higher incomes, lured by friends and relatives and social networks, and fleeing from persecution and armed conflict. Poverty and lack of economic opportunities in source countries are primary drivers of migration. Migrant workers are also commonly held in high regard in impoverished communities that associate migration with social status. In Malaysia, migrants fill the labour market in the construction, plantation, manufacturing, domestic work, agricultural and other service sectors. These are known as 3D jobs (dangerous, dirty and demeaning) that Malaysians allegedly shun due to low wages and poor working environment.

The ILO 2017 study on "Access to Justice for Migrant Workers in South-East Asia" indicated that most complaint cases handled by the Migrant Resource Centres in Malaysia involved severe and compounded labour rights violations, such as withholding of identification documents (77 per cent), inability to take leave from work (74 per cent), excessive work hours (70 per cent), and contract substitution (64 per cent). In total, 94 percent of the cases assisted involved multiple forms of abuse.<sup>11</sup> Additionally, cases from CSOs show that migrant workers who receive assistance have endured one or more labour violations by employers or agents such as non-payment of wages or reduced wages, unlawful wage deductions, long working hours beyond the statutory requirement of

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<sup>8</sup> Finnish Embassy supports research on forced labour, human trafficking and mental health, Embassy of Finland, 2012, <http://www.finland.org.my/public/default.aspx?contentid=263860&nodeid=38517&contentlan=2&culture=en-US> [accessed on 30 September 2018].

<sup>9</sup> ILO: *Review of labour migration policy in Malaysia*, 2016.

<sup>10</sup> *More than 1.7 million foreign workers in Malaysia; majority from Indonesia*, New Strait Times, 2017, <https://www.nst.com.my/news/nation/2017/07/261418/more-17-million-foreign-workers-malaysia-majority-indonesia> (accessed on 30 September 2018).

<sup>11</sup> Migrant Resource Centres in Malaysia are managed by the Tenaganita and the MTUC.

eight hours per day, no rest days, lack of sleep, sub-standard accommodation, lack of food, arbitrary arrest by authorities, extortion by authorities and others, physical and mental harm, withholding of travel documents, restricted movement as well as restricted communication with their families and lack of access to medical care.

Poor migration management and enforcement in countries of origin also contribute to the migrant workers' vulnerability to abuses. Unscrupulous recruiters for example, may employ unlicensed sub agents to convince prospective migrant workers to pay excessive recruitment fees, in return for a job overseas. They promise high pay, easy jobs, overtime, annual leave, fixed working hours, comfortable accommodation with free food to lure prospective migrant workers. Paperwork and travel documents for the prospective migrant workers are dealt by the main agent or sub-agent who are familiar with the system and who may exploit the loopholes in the system in these countries. Cases from CSOs highlight that some of these agents are even able to obtain fake medical certificates for migrants to clear the approval process of the country of origin.

Some employers or agents retain the passports of migrant workers as soon as they arrive in Malaysia despite the Malaysian Passport Act 1966 prohibiting this practice. Through passport retention, workers may be coerced to do a job they would otherwise not agree to. There are instances where migrant workers arriving in Malaysia are made to sign another employment contract with less favourable terms than the one signed in the country of origin. This practice is commonly known as "contract substitution".

Other forms of forced labour in Malaysia are committed during actual employment. In some cases, despite recruitment being completely free and voluntary, the conditions of work change for the worse when workers are coerced by their employers physically or psychologically and made to perform tasks or work in conditions that they would otherwise not accept. A worker can become undocumented overnight if the employer takes his/her identity documents or decides to cancel or not renew the work permit for some reason. In the latter cases, some workers are not informed that their permit has not been renewed whilst there are other cases where workers are coerced into forced labour due to the fact that they are working without a permit. These scenarios highlight the immense pressure that workers face by virtue of having little, or worse no control over their documents. The excessive dependence on employers for such processes creates vulnerabilities that may lead to forced labour. The resulting power imbalance between the worker and the employer leaves the former vulnerable to abuse by the latter. Migrant workers may continue to endure labour exploitation and forced labour due to the lack of a necessary support system in Malaysia, fear being deported back home and the shame, financial consequences and difficulty in accessing legal remedies that would offer adequate compensation for the harm endured by the workers as forced labour victims. The 2017 ILO study 'Access to Justice for Migrant Workers in South-East Asia' showed that the most common remedy provided to migrants in Malaysia was return to their country of origin, which was the outcome for 63 per cent of complaint cases. Some of these cases involved migrant workers who were provided with shelter services after enduring forced labour – and returning home was a high priority. In other cases, however, considering repatriation to be a 'remedy' may be a mischaracterization due to the loss of income, loss of opportunity and investment in migration costs.

On the other hand, refugees, asylum-seekers and stateless persons are also vulnerable to forced labour. Unlike other documented or undocumented migrant workers, these individuals cannot return home in safety and dignity, or have no home country as in the case of stateless persons, and end up in legal limbo in Malaysia. Given their lack of legal status in Malaysia, refugees, asylum-seekers and stateless persons are denied the right to employment and education, while access to public healthcare is either extremely poor or only available at an exorbitant fee. Poverty and hunger

however force them to work, the risk of state punishment notwithstanding. The lack of legal protection therefore gives rise to a widespread situation in which they are compelled to work illegally, and most of the jobs that they find are 3D jobs. This vulnerability also extends to children - UNICEF noted that, “refugee, asylum-seeking, stateless, and irregular migrant children face multiple forms of discrimination that stem largely from their uncertain or lack of legal status in Malaysia. They have very limited access to health care and education, and can be vulnerable to abuse, exploitation and other violations of their human rights.”<sup>12</sup>

## 4 Summary of relevant legislation and policies in Malaysia

Malaysia does not have a specific forced labour law, but relevant laws do exist. These comprise the Federal Constitution of Malaysia which states that no person shall be held in slavery; the Penal Code which criminalizes compulsory labour; the Anti-Trafficking in Person and Anti-Smuggling of Migrants Act which criminalizes forced labour as a form of exploitation under the ambit of the crime of trafficking; the Passport Act which prohibits employers from withholding passports of their workers; the Private Employment Act which regulates recruitment agencies; the Employment Act which provides for basic labour rights of workers with some exemptions for domestic workers; and the Workers’ Minimum Standards of Housing and Amenities Act of 1990 which sets minimum standards of housing, living, medical and social amenities for workers to be provided by the employers.

Taking a piecemeal approach to the offence of forced labour may be detrimental to conveying the actual severity of the offence and often leads to a less than suitable outcome for the aggrieved party. For example, where components of forced labour such as wage deduction and passport retention are treated separately under the Employment Act and the Passport Act, it is likely that the outcome will not adequately represent the totality of harm endured by the victim. In addition, prosecuting cases on multiple counts can be difficult from an investigative and prosecution perspective.

### 4.1 Federal Constitution of Malaysia

The Federal Constitution of Malaysia came into force on 27 August 1957 and is the supreme law of the land. Fundamental liberties of a person are set out in Articles 5 to 13 of the Constitution.

Article 6 of the Federal Constitution states that no persons shall be held in slavery and all forms of forced labour are prohibited with the exception of compulsory national service and work or service carried out by persons as a consequence of a court conviction. The use of the term ‘no persons’ indicates inclusion of all persons, i.e. citizens and non-citizens including migrant workers, documented or otherwise.<sup>13</sup>

Article 8(1) states that all persons are equal before the law and entitled to its equal protection. In the case of *Ali Salih Khalaf V Taj Mahal Hotel*<sup>14</sup>, the Industrial Court held that Article 8 uses the word ‘person’ and not ‘citizens’, and that the rights guaranteed by its equality is extended to documented and undocumented migrants.

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<sup>12</sup> Child Rights Coalition Malaysia: *Status Report on Children’s Rights in Malaysia*, Malaysia, Dec. 2012.

<sup>13</sup> In the case of *Barat Estates Sdn Bhd & Anor v. Parawakan Subramanian & Ors* [2000] 1 MLRA 404, the court upheld the constitutional right of an employee in that “...compelling an employee to work for a particular employer, without affording him a choice in the matter, is merely one form of forced labour.” Essentially the court held that the employee should have the freedom to choose his employment and employer.

<sup>14</sup> Industrial Court of Malaysia: Case No. 22-27/4-1580/12, Award No. 245 of 2014, unpublished.

Article 5(1) of the Federal Constitution states that “No person shall be deprived of his life or personal liberty save in accordance with law” and subsequent articles provide the right to a legal counsel and the right to appear in court within 24 hours. However, the article differentiates the right of liberty with respect to non-citizens who, pursuant to the proviso to the Article, can be detained up to 14 days for immigration offences.<sup>15</sup> Similarly, freedom of movement under Article 9 is confined to citizens only and silent on their application to non-citizens.

#### **4.2 Penal Code**

Section 374 provides that “whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.” Buying or disposing of any person as a slave (Section 370), habitual dealing in slaves (Section 371) and unlawful compulsory labour in Section 374 all refer to “any person” and not “citizen”. However, the penalties are considered lenient to deter forced labour practices could be raised to bring the provision in line with Malaysia’s obligation pursuant to ILO Convention 29.

#### **4.3 Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007**

Enacted in 2007, the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (ATIPSOM) criminalises offences of forced labour as a form of exploitation under trafficking in persons. The Act is extensively used to address human trafficking for labour and sex; specifically to prosecute pimps, syndicates, employers and agents who exploit migrants and refugees. The law establishes stringent penalties of up to twenty years imprisonment and fines for those convicted.

This Act defines trafficking to include all actions involved in acquiring or maintaining the labour or services of a person through coercion. Proving the element of coercion is central to making a case of trafficking or forced labour under the ATIPSOM. Coercion in ATIPSOM is defined as:

- (a) Threat of serious harm to or physical restraint against any person;
- (b) Any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
- (c) The abuse or threatened abuse of the legal process.

The definition of coercion sets the bar very high and in some cases is unattainable for forced labour cases. The above definition does not acknowledge that forced labour could occur using abuse of vulnerabilities and deception. It also does not clearly state psychological coercion that is a powerful coercive practice, and even (b) above, could be subject to misinterpretation. Element (c) of the definition is unclear and of limited application in the types of forced labour cases being seen in Malaysia.

Victim protection support under ATIPSOM includes victim’s immunity from criminal prosecution where such acts are the direct consequence of an act of trafficking in persons that is alleged to have been committed or was committed (Section 25). The Act provides for appointment of Social Welfare Officers or any other public officers to exercise the powers and perform the duties of a Protection Officer and to provide place of refuge for the care and protection of trafficked persons.

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<sup>15</sup> Provided further that in its application to a person, other than a citizen, who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words “without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)” the words “within fourteen days”.

Section 66A states that the order for payment of compensation to the trafficked person is discretionary to the Court. Prosecution may focus on conviction, without asking for compensation, which is of immense importance to the victim. Future review of ATIPSOM could look at the possibility of a mandatory victims' compensation.

The Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants (MAPO) is responsible for implementing ATIPSOM. An anti-trafficking unit has been created under the Royal Malaysian Police and MOHR. There are also specialized positions established in the Immigration Department and Attorney General's Chamber specifically to implement this law.

While ATIPSOM recognizes forced labour exists as a subset or a related form of exploitation under trafficking, the existing legal framework in Malaysia does not provide for instances of forced labour that occur independently of trafficking. This marks a shift from international law and standards which recognize the existence of forced labour in connection with but also independently of trafficking.

#### **4.4 Immigration Act 1959/63**

The Immigration Act 1959/63 (the Immigration Act) supplemented by the Immigration Regulations 1963 governs Malaysia's border controls and security. The Act empowers the Immigration Department to enforce its provisions including handing down penalties for violations of its provisions and creates regulations for detention and deportation. It requires that all persons wishing to enter Malaysia must enter and exit at designated checkpoints, and that all non-citizens hold either an entry permit or pass to enter Malaysia.

The Act confers wide powers to the immigration officers to arrest and detain non-citizens without a warrant if he reasonably believes that an immigration offence has been committed.<sup>16</sup> As such migrant workers, in particular undocumented workers, refugees and asylum seekers may be detained up to 14 days on the grounds of verifying their travel or legal documents. In such instances, it is likely that victims of forced labour amongst this population will be criminalised and made to endure unnecessary detention.

Immigration policy<sup>17</sup> expressly prohibits a change of employer and employment.

Migrant workers entering in order to work in Malaysia are issued with a Visit Pass (Temporary Employment) or VP (TE) subject to passing the medical exam by the Foreign Workers' Medical Examination (FOMEMA), which authorizes the holder to enter Malaysia and remain for up to 12 months, subject to the conditions of the Pass.<sup>18</sup> The Department may extend the Pass "for any further period or periods" as it thinks fit.<sup>19</sup> The dependency on the employer and the consequences of stepping away from this dependency come at a very high cost that most workers can ill-afford. This creates a subtle systemic coercion that impedes the right of a worker to choose to change employer in the event of abuse.

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<sup>16</sup> Section 35 of the Immigration Act 1959/63.

<sup>17</sup> *Recruitment Terms and Conditions of Foreign Workers*, Immigration Department of Malaysia, <http://www.imi.gov.my/index.php/en/foreign-worker.html> [accessed 30 September 2018].

<sup>18</sup> Immigration Regulations 1963, reg 11(6).

<sup>19</sup> Immigration Regulations 1963, reg. 11(6).

A Special Pass is a temporary pass issued to a person who wishes to remain in Malaysia “for any special reason.”<sup>20</sup> The pass is valid for one month, and may, at the immigration officer’s discretion, be extended <sup>21</sup> subject to a monthly administration fee of RM100.<sup>22</sup> Special passes are issued to migrant workers whose VP (TE)’s have expired or been cancelled by the employer but who wish to stay in Malaysia, for example to pursue a legal case. The consequences of this restriction are exacerbated by the excessive dependency of migrant workers on the patronage of an employer. A migrant worker’s VP(TE) is tied to the employer and consequently a worker is unable to unilaterally change employer without terminating the contract of employment and returning home to seek another employment or employer.

With regards to domestic workers, immigration policy states that “...the [foreign domestic helper] does not change employment or change employers without the permission of the Immigration Department of Malaysia.” This suggests that the domestic worker may have an option to change employment with the permission of the immigration authorities.<sup>23</sup> We have no information about whether in practice this actually works well for domestic workers.

There is a lack of clarity on the accountability of employers when it comes to failure to undertake administrative processes that will ensure workers’ legal status and thus protection in accordance with existing laws. However, the onus lies on the employers to arrange all documents necessary for migrant workers to enter into Malaysia. The application process as well as the renewal process of work permits are both carried out by the employer as well. In this way the migrant worker’s documentation status lies in the hands of the employer.

#### **4.5 Passports Act 1966**

In accordance with the Passports Act 1966, all persons who enter and exit Malaysia must hold a valid passport and non-citizens must hold a valid visa. Section 12 (1f) of the Act states that that it is an offense for any person “without lawful authority, has in his possession any passport or internal travel document issued for the use of some person other than himself.” Violation is subject to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.

Pursuant to Section 10 of the Act, Customs, Police and Immigration Department are responsible for enforcement of the provisions of the Act. MTUC and the CSOs have observed that the provisions of the Act relating to prohibition against holding another person’s passport are weakly enforced. Passports are often retained by the agents or employers as soon as the migrant arrives in the country. Often migrants are told that the passports are retained to ease administrative processes such as obtaining or renewing the work permit or VP (TE). Employers assert that they retain passports so that they cannot be lost or damaged and/or to prevent the worker from running away. Replacement of the passport at foreign embassies causes burdensome and costly bureaucratic difficulties. In cases where passports are taken away for safe keeping, many workers cannot access their documents at any given time without the need to ask for permission from their employers or agents. However, it is noted that some companies have reportedly started to provide lockers for workers to keep and access their passports and travel documents.

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<sup>20</sup> Immigration Regulations 1963, reg. 14.

<sup>21</sup> Immigration Regulations 1963, reg. 14(2).

<sup>22</sup> Immigration Regulations 1963, reg. 14(2).

<sup>23</sup> *Foreign Domestic Helper*, Immigration Department of Malaysia, <http://www.imi.gov.my/index.php/en/foreign-domestic-helper-fdh.html> [accessed 30 September 2018].

Further, CSOs raised their concern that some Memoranda of Understanding (MOUs) between Malaysia and countries of origin contain clauses permitting the migrant worker's passport to be held by the employer subject to the consent of the worker. In the employment relationship, the employer is in the position of power and this leads to migrant workers artificially "consenting" to surrender the passport. Passport retention instils fear in the migrant worker, preventing the worker from leaving employment involving exploitative and abusive working conditions. It is a means used to coerce workers into compliance with situations that, given a free choice, they would never consent to. It would appear that the existence of such provisions in the MOU is in direct conflict with the provision of section 12 of the Passport Act.

Passports are usually returned to the worker upon completion of the contract. If the worker terminates the contract, it is almost impossible to obtain the return of the passport. Passports are often also retained to force migrants to renew their contract. It is worth noting that the VP (TE) renewal process is an employer-led process that often involves the employer having possession of the worker's passport.

Embassies usually assist undocumented migrants by issuing a temporary travel document, often, to enable the migrant to return home. The process of filing cases in labour courts becomes difficult when a migrant worker is unable to produce an identity document. Accountability for a lack of identity or travel document is almost exclusively a burden shouldered by the worker as employers are not held accountable for such an offence and are very rarely called upon to explain themselves to law enforcement or other relevant authorities.

Further there is no mechanism to deal with employers who do not to surrender passports of migrants who have returned to their home country, leading to risks that such passports may end up on the black market or used to facilitate the travel of another person.<sup>24</sup>

#### **4.6 Employment Restriction Act 1968**

The Employment Restriction Act 1968 establishes the principle that the employment of a non-citizen in any business in Malaysia must be subject to the issuance of a valid employment permit.

Section 10 of the Act restricts the employment permit to the particular employment and the employer stated on the permit with a validation period not exceeding two years.

The Act is under the purview of the MOHR and confers enforcement powers to the Director General of Labour. However this Act is not widely used and this study has not yielded any case law on the said Act. Since the management of migrant workers falls under the purview of the Ministry of Home Affairs, the issue of employment passes, enforcement thereof and immigration matters are dealt under the Immigration Act 1959/63 rather than the Employment Restriction Act 1968.

However, on 13 Jan 2017, the media reported that the government was proposing to amend the Employment Restriction Act 1968 to impose a higher penalty of RM100,000 on employers for each undocumented worker hired, in an attempt to prevent migrant workers from running away and to deter undocumented workers who are seen as risks to public safety and national security. Although

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<sup>24</sup> *Busted! Syndicate selling fake passport, visit pass for as low as RM1,500*, New Strait Times, 2017, <https://www.nst.com.my/news/crime-courts/2017/10/292221/busted-syndicate-selling-fake-passport-visit-pass-low-rm1500> [accessed 30 September 2018].

the media report stated that the government was looking to table the amendments in March 2017, to date such amendments have not come to fruition.<sup>25</sup>

#### **4.7 Private Employment Agencies Act 1981**

Private recruitment agencies are regulated under the Private Employment Agencies Act 1981. The Act, administered by the MOHR provides for the licensing of any person or company that “acts as an intermediary” between employers and Malaysian workers for the placement of these workers in local positions or overseas.

The Act was amended in August 2017, to increase the government’s ability to regulate recruitment activities of private employment agencies. During the technical review of this Gap Analysis, MOHR shared that the amendment of this Act is meant to better regulate migrant workers’ recruitment and to prevent forced labour resulting from practices of middlemen or agents. Key features of the amendment include the consideration of past convictions on trafficking in persons or forced labour for granting of licenses, as well as revocation and suspension of license if they have a history of detention in relation to trafficking in persons or forced labour. Allowable placement fees imposed on migrant workers are capped to not more than one month of basic wages. Future review and amendment of this Act could incorporate measures to reduce fees paid by the employers to private employment agencies, but at the same time ensuring that the costs are not passed on to the workers.

Malaysian employers seek the assistance of Malaysian recruitment agents for a range of services – to recruit migrant workers and/or manage migrant workers’ welfare while in Malaysia and/or to repatriate migrant workers back to their country of origin upon completion or termination of the employment contract. Aside from the private recruitment agents regulated by the MOHR, outsourcing companies (contractor for labour) are also allowed by law to carry out both recruitment and supply of labour. These outsourcing companies are regulated by the Ministry of Home Affairs. Based on government respondent for this gap analysis, as of May 2018, there are 279 companies that hold outsourcing licences issued by the Ministry of Home Affairs. Interviewees from CSOs contend that licenses for outsourcing companies are granted in a non-transparent manner and policy related to outsourcing agencies is unclear. It is a common misconception among employers that the only way to hire migrant workers is through outsourcing agencies. Amongst the concerns highlighted by CSOs and workers’ representatives are that outsourcing of management of migrant workers to agencies shields principal employers from accountability for workplace harms, exploitation and excludes migrant workers from company grievance procedures because the worker works for a company that is not his/her employer. This also goes against the principle of security of tenure as workers are sent to several companies to work based on the availability of work and wages are paid on a daily basis.<sup>26</sup>

Government officials, during an interview for this study, shared that the last license for an outsourcing company was issued in 2010. Currently, less than 70,000 workers are employed under outsourcing and the government has a target to completely phase-out of the system of labour outsourcing by 2021.

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<sup>25</sup> *Employment Restriction Act to be amended, stiffer penalty for hiring illegals*, Astro Awani, 2017, <http://english.astroawani.com/malaysia-news/employment-restriction-act-be-amended-stiffer-penalty-hiring-illegals-128765> [accessed 30 September 2018].

<sup>26</sup> ILO: *Review of Labour Migration Policy in Malaysia*, Bangkok, 2016.

#### 4.8 Workmen's Compensation Act (WCA) 1952

WCA was enacted "to provide for the payment of compensation to workmen for injury suffered in the course of their employment."<sup>27</sup> "Workman" under the WCA is defined broadly to include anyone employed under a contract of employment, whether written or oral, and whether paid by time or by work done. Specifically excluded from this definition, however, are persons engaged in non-manual labour earning more than RM 500 per month, domestic workers, casual workers and out-workers (those who take piecework back to their homes).<sup>28</sup>

Under Section 26(2) of the Workmen's Compensation Act 1952 (as amended in 1996), it is mandatory for Employers to insure all the foreign workers employed by them under the Foreign Worker Compensation Scheme. There is no exclusion in respect of migrant workers whose employment is not covered by a VP(TE). Section 2(2) of WCA states that if "in any proceedings for recovery of compensation under this Act it appears to the [DoL] or the Court that the contract of service . . . under which the person was working at the time of the accident was illegal, the [DoL or the Court] may, if having regard to all the circumstances of the case . . . it thinks proper so to do, deal with the matter as if the injured person had at such time been a person working under a valid contract of service."<sup>29</sup> Where a migrant worker takes up employment in breach of his/her immigration pass, a question arises as to the 'legality' of the employment contract.<sup>30</sup> The Malaysian courts have yet to apply the WCA to an undocumented migrant worker's case. In the event where illegality stems from an employer's act or omission, it is simply not right to penalise a worker who has suffered harm. In the event of undocumented workers, one could argue that despite illegality, an employment relationship can be implied by the conduct of both parties.

#### 4.9 Employment Act 1955

The Employment Act 1955 deals with issues that are considered indicators of forced labour such as contract substitution, excessive overtime, withholding of wages, debt bondage, abusive working and living conditions.

The Act is applicable to "*Any person, irrespective of his occupation, who has entered into a contract of service with an employer under which such person's wages do not exceed RM 2,000 a month...or engaged in manual labour...or engaged as a domestic servant.*" The Act is silent on the requirement for migrant and domestic workers to be documented, however, it contains provisions that exclude domestic workers from entitlement to maternity protection, rest days or holidays. Hours of work and conditions of service are also not protected. Such exclusions contradict Section 60L of the Employment Act 1955 which reinforces the concept of equality, and the prohibition of discrimination between different categories of workers.

The ILO has noted that the use of the term "domestic servant" to refer to domestic workers is derogatory and not aligned with the spirit of ILO Conventions. (It is noted that the proposed amendments to the Employment Act published in the MOHR website has changed the terminology "domestic servant" to "domestic employee" and allows domestic employees to enjoy the statutory

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<sup>27</sup> Workmen's Compensation Act 1952, Preamble.

<sup>28</sup> Workmen's Compensation Act s. 2(1), definition of 'workman'.

<sup>29</sup> Workmen's Compensation Act s. 2(2). Similar provision is made in worker compensation laws in Australia and UK. This provision is based on a provision of the UK's Workmen's Compensation Act 1906, inserted by Workmen's Compensation (Illegal Employment) Act 1918, see Hansard HC Deb 24 April 1918 vol 105 cc1074. See also Guthrie, 'Illegal contracts Impropriety, immigrants and impairment in employment law' [2002] AltLawJl 43; (2002) 27(3) Alternative Law Journal 116, available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/AltLawJl/2002/43.html>.

<sup>30</sup> The Australian courts have taken different approaches to this, see *Nonferral v Taufia* (1998) 43 NSWLR 312 (fact that migrant is working without permission required by law does not invalidate contract) and *Australia Meat Holdings Pty Ltd v Kazi* [2004] QCA 147 (changed statute prohibiting work did make employment contract invalid) See Berg, Migrants rights at work: law's precariousness at the intersection, 2015, chapter 6.

benefit of one rest day per week. Beyond the rest day, domestic employees are excluded from other protections and benefits.)

Under the Employment Act, employees employed for longer than one month are entitled to a written employment contract stating the terms and conditions of work.<sup>31</sup> The contract is not explicitly required to be explained in a language the worker understands and there is no guidance on when a copy of the contract must be provided to the worker.

Under Article 60A(4)(a) of the Employment Act, limitations on overtime are to be decided via independent regulation. Limitations to overtime are under the “Employment (Limitations on Overtime Work) Regulations” laid out in 1980. The Regulations place a monthly ceiling of 104 hours on the quantity of time a person may be asked to work in excess of their normal working hours, in exceptional circumstances.<sup>32</sup> This contradicts the ILO Hours of Work (Industry) Convention (No. 1) of 1919 which introduced a maximum standard working time of 48 hours per week and eight hours per day as an international norm. In several exceptional cases, working time is allowed to exceed these limits, as long as daily working time remains not higher than ten hours, and weekly working time not higher than 56 hours.

The amendments to the Employment Act could address unauthorized withholding of wages or withholding of wages that could lead to debt bondage by digitizing wage payments and requiring payslips in the Act, and not just in regulations. If payments are documented, workers can assess how much outstanding debt they have so they do not end up in debt bondage situation.

It is illegal under the Employment Act for employers to include any provision in a contract of service which “restricts the right of any employee” to join a trade union, participate in trade union activities, or associate with other employees for the purpose of organizing a trade union.<sup>33</sup> However, under article 10(1)(c) of the Federal Constitution, only citizens have the right to form associations. This means that migrant workers are not allowed to form associations but may freely join associations and bargain collectively in association with unions that have been formed by citizens.<sup>34</sup>

An employer can also be a labour contractor who provides workers for labour to various individuals or companies. Known as outsourcing agencies, they could be both recruitment agent as well as employer.<sup>35</sup> Article 2(1) of the Employment Act also sets out a definition of a “contractor for labour” as a means of creating better accountability for employers who are responsible for hiring foreign migrant workers. This is particularly relevant in a context where outsourcing agencies or labour brokers often double up as employers and where accountability becomes difficult due to a web of complex contractual relationships between contractors and sub-contractors and employers. Whilst this provision was designed to create greater transparency and accountability, over the years this has cemented confusion over who is considered to be the employer under the law – is it the contractor for labour that is technically listed as an employer or is it the company whose premises

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<sup>31</sup> Employment Act 1955, s. 10(1).

<sup>32</sup> An employers’ representative shared that sometimes the workers are the ones who ask for overtime because they want to earn more money.

<sup>33</sup> Employment Act 1955, s. 8.

<sup>34</sup> Both ILC Individual Case (CAS) - Discussion: 2016, Publication: 105th ILC session (2016) and C.98 Observation (CEACR) - adopted 2017, published 107th ILC session (2018), acknowledge that the Employment Act 1955 and the Industrial Relations Act 1967 grants migrant workers the right to collective bargaining.

<sup>35</sup> Another example is that outsourcing agents would be contractors who provide workers to plantation companies for non-core work of the plantation e.g. weeding, or clearing of plantation land. Most outsourcing agencies provide accommodation and transport for the workers out to the worksite of a principal employer. In some cases, recruitment agents who employ women migrant workers to work as domestic workers at a various houses at fixed times. Such workers would usually be employed under general workers visa to work as cleaners in commercial offices. Due to the complexity and cost of hiring in-house domestic workers, this form of employment has become increasingly popular in Malaysia.

and operations are where the worker is actually put to work. Further complications emerge where there are work place accidents or other health and safety issues where both the contractor for labour and the company shun responsibility by virtue of the distance from the occurrence of the health and safety and a lack of direct contractual relationship. (These issue on labour contracting is being addressed in the proposed amendments of the Employment Act.<sup>36</sup>)

Forced labour as a specific offense is introduced in the proposed amendments to the Employment Act. The proposed amendments of the Employment Act incorporating forced labour is a welcome development from the government and increasing the knowledge of Labour Courts or Tribunals in identifying forced labour is therefore necessary. The amendment provides for a definition of forced labour as:

“The condition of any person who provides labour or services by the use of threat or deception, such that a reasonable person in the position of the victim would not consider himself to be free: (a) to cease providing the labour or services; or (b) to leave the place or area where the victim provides the labour or services.”

One key consideration in the amendment of the Act would be the non-criminalisation protection for victims of forced labour similar to the ATIPSOM.

#### **4.10 Minimum Wage Order 2016**

Malaysia introduced a minimum wage of RM 900 per month in 2012, which came into force for migrant workers in December 2013.<sup>37</sup> As of 6 September 2018, the new national minimum wage for workers in the private sector has been set at RM1,050 per month and will take effect on Jan 1 next year. This wage applies to all employees covered by the Employment Act, except domestic workers who are specifically excluded.<sup>38</sup> The minimum wage has an impact on the vulnerabilities of workers to debt bondage and wage deductions with no transparency.

#### **4.11 Workers’ Minimum Standard of Housing and Amenities Act 1990**

The Workers’ Minimum Standard of Housing and Amenities Act 1990 prescribes minimum standards of housing and amenities for workers and their dependents<sup>39</sup> in any building used by an employer for the housing of workers. The Act covers workers employed at any workplace located outside of municipal areas, for example on plantations or farms and applies to any building used by an employer for the housing of workers.<sup>40</sup> It is currently applied only to estate/farm and mine workers.

Under this Act, workers shall not be required to make any payment for rent or charge in respect of any housing, nursery, community hall, sports and other recreational facilities, sanitation and allotment of land provided. As the government plans to amend this Act, it is good to consider the importance of maintaining this provision as a means to prevent debt bondage and withholding of wages, or unfair wage deductions.

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<sup>36</sup> Libat Urus Awam Cadangan Pindaan Akta Kerja 1955 dan Akta Standard-Standard Minimum Perumahan dan Kemudahan Pekerja 1990, Ministry of Human Resources, 2018 <http://www.mohr.gov.my/index.php/en/public-online-engagement/public-online-engagement> [accessed 30 September 2018].

<sup>37</sup> Minimum Wages Order 2012, Minister of Human Resources, 16 July 2012. The minimum wage for Sabah and Sarawak were set slightly lower at RM 800 RM per month and 3.85 RM per hour.

<sup>38</sup> Minimum Wage Order 2016, s. 2.

<sup>39</sup> Workers’ Minimum Standard of Housing and Amenities Act 1990, Preamble.

<sup>40</sup> Workers’ Minimum Standard of Housing and Amenities Act 1990, section 5(1).

While the Act stipulates the provision of “free and adequate” running water, adequate electricity and that the buildings are to be “kept in a good state of repair”<sup>41</sup> including provision of “health, hospital, medical and social amenities” to workers<sup>42</sup>, the Act is silent on the number of persons allowed to share a room and the requirement for bedding and other supplies which is a major issue of contention amongst migrant workers. MOHR could also consider prohibiting building or facility design that restrict workers’ movement. The government may also wish to study the effects of housing large numbers of migrant workers in centralised quarters in terms of cost of travelling for the migrant and employer, which if shouldered by the employer may lead to illegal salary deductions for transport and housing costs.

There are no regulations on housing and amenities for workers employed in urban areas in service sectors such as restaurants and factories as well as private homes. Migrant workers are often housed in crowded, unhygienic and unsanitary conditions which affect their health and right to privacy. Many workers are deprived of sleep due to overcrowding and lack of proper bedding which affects their ability to work and their overall well-being. It is noted that the proposed amendments to the Workers’ Minimum Standards of Housing and Amenities Act 1990<sup>43</sup> has not expanded the scope of this Act to the other sectors and this report reiterates the importance of re-considering such expansion.

The planned amendment of the Act is also an opportunity to address the lack of safe and secure cabinets or lockers for workers to keep their passports, other legal documents and valuables. Such facility could be a requirement to be part of the accommodations. Holding workers’ passports for safekeeping is one of the reasons given by employers on retaining their passports (aside for administrative purposes and fear that their workers will abscond), also partly because of the absence of safekeeping facilities within the workers’ accommodation.

Furthermore, in a statement made by the MOHR Manpower Department in October 2017, it was stated that an estimated 30% per cent of the 3,209 applications for foreign workers submitted by employers had been rejected in 2017 due to a failure to comply with the minimum standard guideline for workers’ accommodation. Compliance with the Minimum Standard for Housing and Amenities Act is a prerequisite for the intake of migrant workers, which includes providing accommodation that is approved by local authorities and the provision of a safe environment. Besides this, male and female workers must also be housed in separate dorms.

#### **4.12 Occupational Health and Safety Act 1994**

The Occupational Safety and Health Act 1994 provides “for securing the safety, health and welfare of persons at work”, to protect others from unsafe work practices.<sup>44</sup> It applies to all sectors, and does not exclude domestic workers.

The exact statistics on the number of migrant workers who have died or injured are not known in Malaysia as there are instances where employers do not report the injury suffered or the death of migrant worker to the department of labour.

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<sup>41</sup> Workers’ Minimum Standard of Housing and Amenities Act 1990, s. 6(1).

<sup>42</sup> Workers’ Minimum Standard of Housing and Amenities Act 1990, Part III.

<sup>43</sup> *Libat Urus Awam Cadangan Pindaan Akta Kerja 1955 dan Akta Standard-Standard Minimum Perumahan dan Kemudahan Pekerja 1990*, Ministry of Human Resources, 2018 <http://www.mohr.gov.my/index.php/en/public-online-engagement/public-online-engagement> [accessed 30 September 2018].

<sup>44</sup> The Occupational Safety and Health Act 1994, Act 514, Preamble.

In 2016, the then Nepalese Ambassador to Malaysia reported that 2,945 Nepalese workers died in Malaysia over the period of 10 years since 2005.<sup>45</sup> He stated that many workers died due to sudden unexpected death syndrome due to possible overwork and long hours.

In 2016, the Director-General of the Department of Occupational and Safety Health stated that there were only 12 safety inspectors to carry out inspections in more than 600 construction sites in Klang Valley alone.<sup>46</sup>

#### **4.13 Industrial Relations Act 1967**

The Industrial Relations Act (IRA) 1967 governs the relationship between employers, employees and their trade unions including setting collective bargaining rules, and procedures for handling trade disputes and guaranteeing the freedom of association.<sup>47</sup>

Section 20(1) of the IRA states that: “Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment.” Section 2 of the Act defines “Workman” to include “any person employed by an employer under a contract of employment to work for hire or reward.” In the case of *Ali Salih Khalaf V Taj Mahal Hotel*<sup>48</sup> the Industrial Court held that “any person” would include a migrant worker, regardless of whether they had a work permit or pass to work in Malaysia.<sup>49</sup>

Representations are filed at the Industrial Relations Department closest to the workplace and must be filed within 60 days of the dismissal (which includes constructive dismissal). CSOs cite that most migrant worker dismissal cases are based on principles of constructive dismissal for example, cases where migrant workers are dismissed for joining a union or participating in a union activity.

#### **4.14 Trade Union Act 1959**

The Act essentially governs the management of trade unions. The Act prohibits non-citizens from holding office in or being employed as staff of a trade union.<sup>50</sup>

In the MEF’s ‘Practical Guidelines for Employers on the Recruitment, Placement, Employment and Repatriation of Foreign Workers in Malaysia’, it is stated that 74% of the respondent companies did not allow their migrant workers to join a union despite the law not prohibiting migrant workers from joining.

In 2008, the Malaysia Trade Union Congress (MTUC) lodged a complaint at the ILO Governing Body alleging that Malaysia had refused migrant domestic workers the right to organize. The Committee

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<sup>45</sup> *Most deaths of Nepalese workers in Malaysia due to cardiac arrest, says ambassador*, The Star Online, 2016, <https://www.thestar.com.my/news/nation/2016/06/12/most-deaths-of-nepalese-workers-in-malaysia-due-to-cardiac-arrest-says-ambassador> [accessed 30 September 2018].

<sup>46</sup> *Only 12 safety inspectors for over 600 construction sites*, The Star Online, 2016, <https://www.thestar.com.my/news/nation/2016/08/30/only-12-safety-inspectors-with-over-600-construction-sites-only-a-handful-can-carry-out-checks/> [accessed 30 September 2018].

<sup>47</sup> Industrial Relations Act 1967, s. 5.

<sup>48</sup> Industrial Court of Malaysia: *Case No. 22-27/4-1580/12, Award No. 245 of 2014*, unpublished.

<sup>49</sup> Industrial Court of Malaysia: *Ali Saleh Khalaf and Taj Mahal Hotel, Case No. 22-27/4-1580/12, Award No. 245 of 2014*, unpublished.

<sup>50</sup> Trade Union Act 1959, ss. 28(1)(a) and 29(2)(a).

found the allegation to be true and recommended that Malaysia “ensure the immediate registration of the association of migrant domestic workers.”<sup>51</sup> To date, Malaysia has taken no steps to implement the recommendation.<sup>52</sup>

#### 4.15 The Contracts Act 1950

This Act governs any kind of lawful agreement formed by act, in writing or orally between two or more free consenting parties in exchange for consideration. This includes employment contracts between agents or employers and migrant workers including domestic workers.

A contract is deemed legal and enforceable if all parties freely consent to the terms of the contract. As mentioned in an earlier paragraph, a migrant worker who is forced to commit to a contract or a substituted contract may have a remedy in the civil courts. However, for the migrant worker to pursue a case in the civil courts, he would have to obtain a special pass and remain in the country throughout the duration of the case which may take years.

In *Sampath Kumar Vellingiri & 78 Yang Lain v Chin Well Fasteners & Co Sdn Bhd*,<sup>53</sup> the defendant (employer) hired a group of Indian migrant workers using the services of a recruitment agent in India and a consultant in Malaysia. The Indian agent made verbal representation to the workers that they would receive salaries as high as RM750 per month but that they would have to pay their travel cost and levy to which they agreed and duly paid. The Malaysian agent submitted a contract to the Indian Embassy in KL which stated that the workers would be paid RM600 and the employer would bear the travel cost and levy. When the workers received their first month’s salaries, they found that the employer had only paid them a salary of RM350 and had deducted a sum of RM120 for the levy payment. The workers were able to obtain a copy of the contract submitted by the employer from the Indian Embassy and discovered that the contracts had only been signed by the employer. When they returned to the workplace their timecards were withheld and they were asked to sign a different contract with a lower salary and benefits. Upon continuous protest the employer stated that he would be sending the workers back to India. In response, some of the workers locked themselves in the hostel resulting in the employer cutting off the electricity and water. Some of the workers signed the contract under duress. The High Court held that the workers had agreed to take on the employment based on the representations made by the Indian agent and that the second contract was void as the workers had not seen nor signed it. In the Court of Appeal, the court held that the contract submitted to the Indian Embassy was a valid contract as it was approved by the Indian government and that no changes could be made without the Embassy’s approval. Further, the employer wilfully submitted the contract to the Embassy and therefore could not rely on the absence of signatures to invalidate the contracts. The employer was ordered to honour the verbal contract between the agent and the workers comprising the payment of RM 750 wages, overtime, the cost of their airfare, and levy payments.

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<sup>51</sup> Report in which the committee requests to be kept informed of development - Report No 353, March 2009, Case No. 2637, ILO, [http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002\\_COMPLAINT\\_TEXT\\_ID:2911366](http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2911366) [accessed 30 Sept 2018].

<sup>52</sup> Effect given to the recommendations of the committee and the Governing Body - Report No 376, October 2015, ILO, [https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002\\_COMPLAINT\\_TEXT\\_ID:3255098](https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3255098) [accessed 30 Sept 2018].

<sup>53</sup> *Sampath Kumar Vellingiri & 78 Yang Lain v Chin Well Fasteners & Co Sdn Bhd*, Case Law Database, UNODC, [https://www.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/mys/2003/sampath\\_kumar\\_vellingiri\\_78\\_yang\\_lain\\_v\\_chin\\_well\\_fasteners\\_co\\_sdn\\_bhd.html](https://www.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/mys/2003/sampath_kumar_vellingiri_78_yang_lain_v_chin_well_fasteners_co_sdn_bhd.html) [accessed 30 Sept 2018].

## 5 Summary of findings of the gap analysis

### 5.1 Forced labour definition

#### ILO Convention 29 Article 2

1. For the purposes of this Convention the term “forced or compulsory labour” shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.
2. Nevertheless, for the purposes of this Convention, the term “forced or compulsory labour” shall not include:
  - (a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;
  - (b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;
  - (c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;
  - (d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;
  - (e) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or

ILO Convention 29 provides the legal definition for forced labour, which is reaffirmed by the Forced Labour Protocol. In the Forced Labour definition, “all work or service” encompasses all types of work, employment or occupation. The nature or legality of the employment relationship is therefore irrelevant. “Any person” refers to adults as well as children. It is also irrelevant whether or not the person is a national of the country in which the forced labour case has been identified. “Menace of penalty” refers not only to criminal sanctions but can take the form of loss of rights, advantages or privileges. It also includes, but is not limited to threats of violence.

In Malaysia, The Penal Code criminalizes those who “unlawfully compel any person to labour against the will of that person”. However, in practice, this provision of the Penal Code is considered to be too lenient a penalty to be applied to forced labour cases.<sup>54</sup>

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<sup>54</sup> According to the 2007 ILO General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105) Article 25 of the Convention stipulates that “The illegal exaction of forced or compulsory labour shall be punishable as a penal offence” and that it shall be “an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced”. On the basis of this provision, the Committee examines whether the

Based on respondents for this gap analysis, those that would meet the trafficking requirements would be tried under ATIPSOM. Otherwise, the case would most likely be pursued under the appropriate labour laws, which currently does not show the severity of forced labour and does not provide appropriate sanctions to deter continued practice.

Forced labour exists as a subset of human trafficking under the ATIPSOM, although it is not defined in the Act. Proving the element of coercion is central to making a case of trafficking or forced labour under the ATIPSOM. The required proof of coercion sets the bar very high and in some cases will be unattainable for forced labour cases as described below. Coercion is defined in the Act as:

- (a) Threat of serious harm to or physical restraint against any person;
- (b) Any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person;
- or
- (c) The abuse or threatened abuse of the legal process.

The above definition does not acknowledge that forced labour could occur using abuse of vulnerabilities and deception. It also does not clearly state psychological coercion that is a powerful coercive practice, and while implied in (b) could be subject to misinterpretation. Element (c) of the definition is unclear and of limited application in the types of forced labour cases being seen in Malaysia.

There are a range of cases that are likely to meet the elements of involuntariness and threat or menace of penalty but that would not fall within the definition of trafficking in the ATIPSOM by virtue of not satisfying the coercion element of the definition. Such cases are also not being filed under the Penal Code provision as it does not provide for a proportionately serious penalty. Hence these cases are at times dealt with under existing labour laws. Examples of these are: a case of forced overtime with financial penalties imposed on a worker; where a worker has no freedom to resign even satisfying the legal requirements and is dismissed from employment; where there is limited freedom of movement and communication and threats of dismissal from employment; where there is deceptive recruitment and confiscation of identity documents.

The proposed amendments of the Employment Act provides for a definition of forced labour as:

“The condition of any person who provides labour or services by the use of threat or deception, such that a reasonable person in the position of the victim would not consider himself to be free: (a) to cease providing the labour or services; or (b) to leave the place or area where the victim provides the labour or services.”

However, one gap in the tackling of forced labour through labour laws is the absence of the non-criminalisation protection for victims of forced labour similar to the ATIPSOM.

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national legal framework establishes penal sanctions for practices pertaining to forced labour, and whether those provisions can be applied easily in practice by the courts to punish those responsible for such acts. The Committee also seeks to ensure that the penalties are really adequate, that is, that they are sufficiently dissuasive to put an end to such practices.

## 5.2 Penal sanctions

### **ILO Convention 29 Article 25**

The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced.

Malaysia has set forced or compulsory labour to be punishable as a criminal offense according to its Penal Code and the ATIPSOM.

The Penal Code defines criminal offences in Malaysia, and sets guidelines for punishment.<sup>55</sup> Sections 370 and 371 of the Penal Code define “slavery” as “importing, exporting, buying or disposing of a slave”. The maximum sentence for slavery is seven years and a fine. Habitually dealing or trafficking in slaves is punishable by up to 20 years imprisonment and a fine. Section 374 of the Penal Code also defines “unlawful compulsory labour” as “compelling a person to work against their will”, which is punishable by up to one year imprisonment, a fine, or both.

Section 13 of ATIPSOM on “Offence of trafficking in persons by means of threat, force, etc.” provides punishment with imprisonment for a term not less than three years but not exceeding twenty years, and shall also be liable to fine. On the other hand, Section 14 of ATIPSOM on “Offense of trafficking in children” provides for a term of imprisonment of not less than 3 years but not exceeding 20 years, and also, a fine.

The proposed amendments to the Employment Act states that “Any person who contravenes subsection (1) or (2) commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit.” The government should consider whether a maximum fine of MYR50000 without a term of imprisonment can be considered adequate within the meaning of the Forced Labour Convention, 1930 (No. 29).

## 5.3 National policy and plan of action

### **Forced Labour Protocol Article 1**

Each Member shall develop a national policy and plan of action for the effective and sustained suppression of forced or compulsory labour in consultation with employers’ and workers’ organizations, which shall involve systematic action by the competent authorities and, as appropriate, in coordination with employers’ and workers’ organizations, as well as with other groups concerned.

Malaysia is tackling the forced labour issue as part of the National Action Plan on Anti-Trafficking in Persons (2016-2020) (NAP-TiP), specifically under the section for the Committee on Labour Trafficking. Priority outputs related to forced labour indicated in the NAP are: enhanced monitoring of workplaces; increase awareness of employers in relation to labour standards and forced labour; enhanced cooperation and coordination among agencies; and enhanced ethical recruitment standards for migrant workers through bilateral agreement or MOUs.<sup>56</sup>

<sup>55</sup>Originally enacted in 1936 by the British for the Federated Malay States, in 1976 the government consolidated the separate laws of Peninsula Malaysia, Sabah and Sarawak into one national Penal Code.

<sup>56</sup> It must be noted that as of August 2018, the Malaysian Government has currently declared a moratorium on all bilateral MOUs and has been seeking to renegotiate the terms of these agreements.

It is apparent that the interventions in the existing NAP-TiP are insufficient to achieve significant results in terms of reducing or eliminating forced labour practices, and therefore would need to be reviewed and re-planned in order to reflect the appropriate priorities in addressing the forced labour issue in Malaysia. For example, some of the systemic vulnerabilities such as unclear regulations of outsourcing agencies, exorbitant recruitment fees that can lead to workers' debt bondage, illegal salary deductions, increased employer accountability and widespread passport retention must be addressed in a holistic Action Plan. Nevertheless, it is acknowledged that this NAP-TiP is undoubtedly a good starting point for developing a much more comprehensive plan on forced labour, still within the same framework because of its established structure, monitoring and implementation mechanism and resource allocation. As noted by key stakeholders, such plan on forced labour should be developed through an evidence-based tripartite plus consultation process<sup>57</sup>.

## 5.4 Prevention

### 5.4.1 Awareness raising

#### **Forced Labour Protocol Article 2**

The measures to be taken for the prevention of forced or compulsory labour shall include:

- (a) educating and informing people, especially those considered to be particularly vulnerable, in order to prevent their becoming victims of forced or compulsory labour;
- (b) educating and informing employers, in order to prevent their becoming involved in forced or compulsory labour practices

The Malaysian government's efforts on raising awareness about workers' rights include mandatory Employers' Undertaking briefings, sectorial awareness raising and roadshows in coordination with different employers' associations in each sector. These efforts were made through the National Human Resources Consultative Council and as part of nationwide awareness raising when the Minimum Wage Order of 2012 was released. There are also efforts involving placing banners in Immigration and Customs checkpoints and announcements on aircrafts about the potential punishments for persons involved in trafficking in persons.

Forced labour, being part of trafficking is included in these awareness initiatives. However, without clear illustrations and examples, understanding of forced labour may be limited to extreme cases and would fail to show the importance of non-visible indicators of forced labour and psychological coercion. The confusion about trafficking, forced labour and sub-standard working conditions concepts among stakeholders was apparent during the course of the consultations for this study. This lack of clarity could have serious implications on the quality and scope of awareness raising on forced labour provided to the public as well as prosecutions of perpetrators.

The government is yet to launch a nationwide campaign against forced labour, about its specific indicators and providing clear illustrations. Any such campaign would be more effectively carried out in collaboration with other non-government stakeholders such as employers, unions and CSOs. It could also benefit the anti-trafficking and anti-labour exploitation efforts of the country on a broader

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<sup>57</sup> Tripartite-plus includes the traditional stakeholders (government, employer and employee organizations) together with civil society players and other advocates.

scale. The government has the available multimedia means for disseminating information about forced labour to workers, employers and the public and it could partner with other organizations to develop or use the forced labour materials.

The government launched its first 'Guidelines and Tips for Employers of Foreign Domestic Helpers' which contain useful information on laws and best practices related to recruitment and employment of migrant domestic workers. However, the guidelines are not legally binding. The government's efforts to educate employers on information pertaining to domestic workers are most welcome but for better accountability it is important to give legal effect to domestic worker rights pursuant to these guidelines and to ensure accountability of employers for any act of exploitation aimed at domestic workers.

#### **Forced Labour Protocol Article 2**

(c) undertaking efforts to ensure that:

(i) the coverage and enforcement of legislation relevant to the prevention of forced or compulsory labour, including labour law as appropriate, apply to all workers and all sectors of the economy; and

(ii) labour inspection services and other services responsible for the implementation of this legislation are strengthened;

(d) protecting persons, particularly migrant workers, from possible abusive and fraudulent practices during the recruitment and placement process;

(e) supporting due diligence by both the public and private sectors

(f) addressing the root causes and factors that heighten the risks of forced or compulsory labour.

#### **5.4.2 Coverage and enforcement of legislation applicable to all workers**

Based on the previous section on the review of relevant legislation and policies, it appears that the Federal Constitution, Penal Code, ATIPSOM, Passports Act and Private Employment Agencies Act covers within their scope of application all workers from all sectors and regardless of legal status, from forced labour or practices resulting to forced labour. However, the following legislation and policies have specific limitations that could result in workers not receiving the requisite protection against forced labour:

- **Immigration Act** – Undocumented migrants are subject to immediate arrest and detention if caught by authorities and face strict sanctions for violating the Immigration Act. Without proper screening procedures, some victims of forced labour who have become undocumented because of employers' practice of retention of legal documents or failure to renew work permits, are effectively re-victimized. Also, since permission to stay and work in Malaysia is strictly tied to an employer, the threat of retaliatory dismissal is sometimes used to coerce migrant workers (Verité, 2014).
- **Workers' Compensation Act** – excludes those engaged in non-manual labour who are earning more than RM 500 a month, domestic workers, casual workers and out-workers.

- **Employment Act** – excludes persons whose wages exceed RM 2,000 a month unless the work is manual labour. It contains provisions that exclude domestic workers from basic labour rights’ protections.
- **Minimum Wage Order** – excludes domestic workers from coverage on the minimum wage.
- **Workers’ Minimum Standard of Housing and Amenities Act** – covers only workplaces located outside of municipal areas; currently applied only to estates/farms and mine workers.

#### 5.4.3 Labour inspection and workplace monitoring

According to the 2018 TIP report, in 2017 identification of labour trafficking cases continued to rely on labour inspections in response to workers’ complaints of non-payment of wages<sup>58</sup> and other violations. The Department of Labour is a member of the Special Enforcement Task Force (SETF) under MAPO.

Based on the ILO report on Needs Assessment of the Malaysian Labour Inspection (2018), labour inspectors in Malaysia have the power to enter freely workplaces liable to inspection and to carry out investigations and inquiries to determine compliance with applicable labour laws. Malaysian law also has provisions to address possible obstruction of an inspector in the performance of her or his duties.

The number of inspectors appears to be insufficient to secure the effective discharge of the duties of the inspectorate. This is confirmed by anecdotal descriptions by officials of the excessive workload of inspectors and the ability to only cover a small portion of workplaces annually through inspection visits.

In addition to the challenge posed by the understaffing of the labour inspection system, the multiple responsibilities assigned to labour officers further constrains their ability to carry out the primary inspection functions. Labour officers in Malaysia perform a range of tasks including the conciliation, mediation and prosecution of cases. Such work is time consuming and would normally require specialized legal training and skills.

The majority of inspections are announced visits. However, with unannounced visits, inspectors are more likely to view “normal” working conditions and workers may perceive inspectors to be more independent when visits are unannounced. This is particularly important for identifying cases of forced labour.

#### 5.4.4 Recruitment and placement of migrant workers

For many years, the Malaysian Government has set targets and policies to reduce the number of migrants employed in Malaysia in order to encourage economic restructuring. The New Economic Model of Malaysia in 2010 and other policy documents have sought to reduce dependency on migrant workers through a variety of strategies, including charging a levy for their employment, introducing a minimum wage, raising the retirement age and increasing the number of women entering paid employment. However, changing the composition of its labour force has proven difficult to achieve, with employers complaining of severe shortages in some industries when more restrictive policies have been applied.<sup>59</sup>

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<sup>58</sup> According to the Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants (MAPO), there is also a specific internal guideline that has been prepared that includes non-payment of salary for three months as a form of labour exploitation.

<sup>59</sup> ILO: *Review of labour migration policy in Malaysia*, Bangkok, 2016.

Malaysia's recruitment policies have changed in recent years, with the amendment of the Private Employment Agencies Act and the current shifting of levy payment to employers. Other important hurdles include: further reducing the recruitment cost for employers while ensuring that they are complying with the labour policies and affording all their workers protection to avoid a race-to-the-bottom situation on workers' rights; ensuring that employers are not passing on their costs to employees through unlawful salary deductions<sup>60</sup>; strictly enforcing the requirements for having written employment contracts; prohibiting passport retention; ensuring employer accountability when it comes to acquiring legal documentation for workers, and that workers are not held legally liable for failure to do so by the employers.

Recruitment and placement of workers are areas that are governed by the bilateral agreements between Malaysia and countries of origin. Due to confidentiality, copies of these agreements or their salient points have not been shared with the ILO and the consultants for this study and it is therefore difficult to extrapolate and confirm verbal reports regarding the matter. However, it is important that such agreements and MOUs do not contain provisions that may be detrimental to workers' protection and likely put them at risk of forced labour, for example, allowing employers to keep workers' passports, notwithstanding workers' consent, and that workers should be able to access passports at any given time without the need to ask permission from another person.

The processes that require payment from employers include the application for a Visa with Reference (VDR) approval before employing migrant workers. If the application is not approved, the employer stands to lose a considerable amount of money. Where the application is approved for lesser number of workers, the employers will tend to recoup lost monies from existing workers by withholding or deducting wages. Another cost for employers is renewal of work permits<sup>61</sup>.

According to the MOHR, workers are required to sign their contract in their countries of origin but the study found that this requirement is not tied to administrative processes in Malaysia such as securing a VDR by employers and Visit Pass (Temporary Employment) (VP(TE))<sup>62</sup> for the workers. For the VDR, only the copy of migrant worker's passport, payment of the levy, medical certificate and insurance documentation must be submitted. There is a risk of contract substitution, which is an indicator of forced labour, in the absence of checking that employers' comply with the requirement of having their workers sign the employment contract prior to arrival in Malaysia.

Additionally, migrant workers with valid VP (TE)s are issued an identity card called the i-KAD, at no cost. Each card is colour-coded according to the sector of employment. The validity period of the i-KAD is the same as the worker's VP (TE). The card is sent directly to the employer or company by an authorized vendor. There are reports that some cards are not given to the migrant workers which increases the vulnerability of the migrant worker to arrest and detention.

A Government to Government, or G to G, mechanism of recruitment of migrant workers that does not involve agents, third parties, middle men, private employment agencies or other recruitment agents in either country was piloted with Bangladesh. The CEACR noted the Government's report on the measures taken by the Department of Labour to protect migrant workers including, the

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<sup>60</sup> On the issue of payment of salary by banks, there are reports that some domestic workers do not have the full control of their bank accounts. Upon opening of the bank account in Malaysia, the mobile number used to activate the account is that of their employers or in some instance the employer withdraws the salary and deducts fees from the amount before giving the money to the domestic worker.

<sup>61</sup> Migrant workers depend on the employers for the renewal of their work permits and have no way of determining if the process has been completed as the online system is only accessible by the employer or agent.

<sup>62</sup> The Visit Pass (Temporary Employment) [VP(TE)] is issued to migrant worker after he or she arrives in Malaysia and is certified fit by clinics/medical centre certified by FOMEMA.

establishment of a mechanism of recruitment of foreign workers on a government to government (G to G) basis in order to prevent human trafficking and other forced labour practices. The Government states that the G to G mechanism of recruitment of foreign workers will not involve agents, third parties, middle men, private employment agencies or other recruitment agents of both countries, but shall be conducted through the departments appointed by the two countries.<sup>63</sup> A report by the United Nations Inter-Agency Project on Human Trafficking in 2011 showed how the exorbitant recruitment fees is a reason why domestic workers end up working without pay between 4.5 and 12 months, to repay their employers “the debt they are said to have incurred”. According to the ILO’s Review of the Government-to-Government Mechanism for the Employment of Bangladeshi Workers in the Malaysian Plantation Sector, overall the G-to-G mechanism is a good practice model that has led to dramatic reductions in the cost of migration, eliminated debt burdens, and demonstrated that a state-managed recruitment and placement option is a credible one. It further noted that while there were operational problems in the pilot mechanism, no serious attempt has been made to evaluate its operation and address issues affecting its effective functioning.

#### **5.4.5 Private and public sector due diligence**

Since January 2018, the government requires all employers to sign and abide by the Employers’ Undertaking document they sign prior to hiring migrant workers. The undertaking contains the following employer obligations;

- (i) to pay the levy for migrant workers in accordance with the Fee Act 1951;
- (ii) to sign a contract of employment in accordance with the Employment Act 1955 using the format prescribed;
- (iii) to pay the employee wages and overtime payments and provide annual leave and rest days in accordance with the Employment Act 1955;
- (iv) to comply with government requirements on the minimum wage as provided by the National Wages Consultative Council Act 2011;
- (v) to provide accommodation and basic amenities in accordance with the Workers’ Minimum Standard of Housing and Amenities Act 1990;
- (vi) not hold or keep the migrant worker’s passport in accordance with the Passport Act 1966;
- (vii) not employ any undocumented workers contrary to the Immigration Act 1959/63;
- (viii) to undertake to settle all medical bills of migrant workers in the event the migrant worker does not settle the bills;
- (ix) to repatriate migrant workers who contract serious illnesses, communicable diseases or who are not medically fit to work;
- (x) to obtain a Check Out Memo from the Immigration Department of Malaysia before repatriation of the migrant worker to the country of origin; and
- (xi) to abide by any orders that may be issued by the government from time to time in relation to the employment of migrant workers.

The Undertaking also states that in the event that the employer fails to abide by the provisions in the undertaking, the employer will be liable under relevant laws and regulations stated therein and will be subject to an administrative sanction potentially blacklisting the employer from recruiting migrant workers in the future. The Undertaking does not specifically prohibit employers from committing forced labour.

Aside from the disclosure requirements of Bursa Securities Malaysia Berhad (“Bursa Malaysia”), there is no evidence that the government has a policy requiring all employers and businesses to

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<sup>63</sup> Annex A: Observation (CEACR) – adopted 2016, published 106<sup>th</sup> ILC session (2017)

submit periodic reports demonstrating that individual employment or business operations, including supply chains, have measures in place to prevent labour exploitation, promote transparency in reporting forced labour cases found in their operations and providing remedial support to the victims.

#### **5.4.6 Addressing the root causes of forced or compulsory labour**

According to the 11th Malaysia Plan, the country will place greater emphasis on increasing productivity to achieve a more sustainable, inclusive, and high rate of economic growth. Improving management of migrant workers is also an important part of the agenda of the new government under the Pakatan Harapan Manifesto.

The risk that forced labour issues continue despite significant development on other areas remains unless prevention of forced labour and other labour exploitation is a lens that is used for policy and programme development. Government efforts to understand and address the root causes of forced labour are yet to be seen in practice and to permeate the overall approach for dealing with the issue in both the source and destination countries.

### **5.5 Protection**

#### **Forced Labour Protocol Article 3**

Each Member shall take effective measures for the identification, release, protection, recovery and rehabilitation of all victims of forced or compulsory labour, as well as the provision of other forms of assistance and support.

The US TIP Report 2017 noted that the Malaysian government demonstrated increasing efforts by expanding trafficking investigations, prosecutions and convictions. The government established a new interagency law enforcement task force assigned and trained on investigative techniques. Their tasks include identification of trafficking victims. Under the ATIPSOM, enforcement officers are required to “investigate into the circumstances of the person’s case for the purpose of determining whether the person is a trafficked person.” The UN Special Rapporteur noted that the above entities “have a primary responsibility for identifying trafficking in collaboration with each other.”

For the purpose of uniformity, Standard Operating Procedures for the ATIPSOM task force were launched in 2013 for enforcement agencies to ensure a commitment to the process of identification, referral, assistance and social inclusion of the presumed or identified victims of TIP. In 2017, 1,558 victims of trafficking were identified. Of these, 106 risk assessments were conducted and 6 victims were granted work visas and a further 12 were granted special immigration passes.

While there is a standardized procedure to identify trafficking victims, procedures on identification, referral and remedies specifically for forced labour cases (within and without the ambit of trafficking) is lacking at the moment. It does not provide illustrations and examples for each indicator. This is important as not all situations would meet the criteria for trafficking but would nevertheless need to be dealt with in order to ensure victim protection. For instance, where raids take place and undocumented workers are picked up, the government should have measures to screen victims of forced labour to avoid the victims from being detained in an immigration detention centre.

In addition, in cases where workers are deemed to be free to move within and beyond work premises enforcement agencies tend to negate any other ill treatment the worker suffered. In this case, emphasis on freedom of movement, without looking at other less obvious indicators of forced labour, is likely to negatively impact a finding of forced labour. The existence of psychological coercion in the forms of threat or debt bondage are often disregarded or not given due consideration in cases where there is freedom of movement. This demonstrates (i) a lack of conceptual clarity of forced labour; (ii) a lack of knowledge and skills in identifying indicators of forced labour; and (iii) a lack of understanding of the impact of coercion in the context of forced labour. The enforcement agencies have not been trained specifically on forced labour and have not been introduced to psychological coercion concepts that would be difficult to determine outright.

There seems to be a lack of labour compliance strategy that, while taking into account the limited number of inspectors, also finds strategic collaboration with other relevant partners such as regulatory bodies, certification agencies, employers' organizations, trade unions and CSOs.

The MTUC and members of CSOs have also identified forced labour cases by accepting complaints from victims. Often, due to their victim-centred approach and services, victims turn to these organizations for help. However, very few CSOs have good working relationships with government authorities. Trust-building between these organizations is important to enable effective coordination toward the collective goal of improving workers' rights. Some victims also lack trust in the justice system's ability to protect them. Changing this perception would require assurance of victims' safety and protection and a commitment to ensure that such protection is embodied in legislation. It is necessary to establish a safe and secure feedback mechanism and complaints system that do not disadvantage victims for reporting exploitation and seeking enforcement of their rights.

It appears that the current initiatives on victim identification are reactive rather than proactive. A complaint triggers rescue and assessment of the cases whether they are trafficking cases or not. Efforts on raising community awareness about trafficking would need to tackle the different forms of forced labour and the referral of cases to appropriate agencies.

As explained in the previous sections, the migrant worker's work permit is tied to the employer and the duty to renew the work permit is the responsibility of the employer or agent. Workers are also subject to the widespread practice of passport retention. All the while, these migrant workers are vulnerable to arrest and detention. Upon detention, the onus is on the migrant worker to prove that he or she is not an "illegal", as what the authorities call them. The courts, including the judges and prosecutors, often do not look into the root cause of migrants becoming undocumented or do not require the employer to attend court. Legal representation is not available to foreign nationals under the National Legal Aid Foundation. CSOs share that migrants often plead guilty to avoid prolonged detention.

Undocumented migrants who are arrested are detained in special detention facilities that Amnesty International describes in their report to be "extremely overcrowded". They fail in fundamental ways to meet basic international standards and generally accepted good practice for the treatment of detainees and the management of institutions. Detainees in immigration centers lack bedding, regular access to clean water, medication and sufficient food. They spend most of their time in their cells with no opportunities for exercise, organized worship or other activities. Diseases spread quickly, and fights are common. Detainees under the age of 18 are held together with adults. Many migrants remain in detention for extended periods of time because they cannot meet the costs of a flight back home: deportation in Malaysia is "generally at the detainee's expense". Some foreign missions are unable to provide for the flight back due to the numbers and costs involved. At times, CSOs pay or facilitate families and migrant communities to raise the funds.

In the past, the Malaysian government has conducted several amnesty and rehiring programmes. As of May 28, 2018 a total of 744,942 irregular migrants and 83,919 employers had registered under the rehiring programme. The new government announced that the rehiring process of undocumented migrant workers would end by 30<sup>th</sup> June 2018.<sup>64</sup> One of the requirements pursuant to registration in the rehiring programme is that the worker must have an employer. The registration is also done through an agent accredited by the previous government. Employers, especially SMEs, were not willing to cover fees, ranging between RM 1,395 and RM 3,485 per worker, that would make the worker documented and to re-hire the worker. It is the opinion of some employers that the fee should have been reduced to encourage more registrations.

The Ministry of Women, Family, and Community Development maintains seven facilities to house trafficking victims—four for women, one for men, and two for child trafficking victims. The government provides basic services to those staying in the facilities, including food, medical care, social support and security. The victims are placed in a protection home or shelter, managed by NGOs, to facilitate the prosecution of perpetrators and until the victims are ready to return home. Group and personal counselling and psychosocial support are provided by the Ministry to the victims. Depending on the complexity of each case, the victims can be placed in a protection shelter for a period of up to 2 years. At any one time, the number of women in a protection shelter can rise to over 300 victims with up to 30 – 40 children in the children’s protection shelter. Not all States in Malaysia have victim shelters.

Subsidies for migrant workers’ medical services were completely withdrawn by the Health Ministry in 2016. Undocumented migrants who seek medical treatment at a government facility risk arrest, detention and deportation. Hospital staff, including doctors are required to inform immigration officials if an undocumented migrant registers him/herself for treatment. Undocumented migrants fear accessing medical treatment even in situations where it is vital for their survival.<sup>65</sup> Migrants who decide to seek medical treatment in government facilities but are found to have contracted communicable diseases such as tuberculosis, HIV/ AIDS, or are pregnant are deported.<sup>66</sup>

## 5.6 Remedies, such as compensation and access to justice

### **Forced Labour Protocol Article 4**

1. Each Member shall ensure that all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies, such as compensation.
2. Each Member shall, in accordance with the basic principles of its legal system, take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.

<sup>64</sup> *Government halts rehiring programme for illegal workers*, FMT News, 2018, <http://www.freemalaysiatoday.com/category/nation/2018/06/07/government-halts-rehiring-programme-for-illegal-workers/> [accessed 30 September 2018]

<sup>65</sup> It was shared during the gap analysis consultation that Johor and Penang have allegedly health desks to watch out for undocumented migrants.

<sup>66</sup> ILO: *Mapping of Migrant Rights Civil Society Organizations in Peninsular Malaysia*, 2017, unpublished.

According to the ILO study on Access to Justice of Migrant Workers (2017), the mechanisms for assistance with dispute resolution, administrative complaint mechanisms, and criminal and court hearing proceedings are established in legislations but not always accessible in practice.

In the event of a breach of labour rights, workers can lodge a complaint with the Labour Department and with the Industrial Relations Department. The Labour Department is mandated to accept complaints relating to violations of the Employment Act, the Minimum Wage Order, the Workers' Minimum Standard of Housing and Amenities Act, the Workmen's Compensation Act, and the Anti-Trafficking of Persons and Smuggling of Migrants Act. The Industrial Relations Department is responsible for resolving cases of unfair dismissal, filed under Section 20 of the Industrial Relations Act.<sup>67</sup>

ATIPSOM provides for the protection of victims from prosecution and penalty for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to trafficking, including for the purpose of forced or compulsory labour. It is important to note that given the lack of clarity in relation to the identification of forced labour, it is highly likely that a forced labour case may be dealt with under the Employment Act so that such protection from prosecution set out in ATIPSOM will not apply.

Under the supervision of the Director of Public Prosecutions of the Attorney-General's Office of Malaysia, there are two prosecution officers in every state serving as specialist prosecutors for trafficking in persons. A special court in Kuala Lumpur was established with the intention to expedite trials of trafficking cases. Five more special trafficking courts were established in 2018 in Ipoh, Perak; Balik Pulau, Penang; Melaka; Muar, Johor and Kota Kinabalu, Sabah. The Malaysian Bar also provides pro-bono services through its fifteen Legal Aid Centers (LAC), which differ in purpose to the Government Legal Aid Bureau (LAB). The LACs are funded by Malaysian Bar's practicing lawyers' membership subscriptions, while the LABs are government-funded. LACs assist both documented and undocumented foreign nationals including migrants and refugees. However, the resources and capacity of the legal aid centres are insufficient to handle the demand for assistance by these vulnerable groups. In Aug 2017, the government passed the Legal Aid (Amendment) Act 2017 which removes the right to legal aid for foreign nationals pursuant to Section 29 of the Legal Aid Act 1974<sup>68</sup> reasoning that the LAB was serving more foreign nationals than local, a move that was criticized by the Malaysian Bar.<sup>69</sup>

Key restrictions affecting workers seeking to access justice include the fear of being or becoming undocumented, debt bondage or wage retention that act as duress, non-availability of legal aid, limited or lack of understanding of rights and, in certain cases, restrictions on freedom of movement and isolation. These factors individually or in combination make accessing help more difficult. The employment circumstances of migrant workers such as short-term contracts, fear of retaliation from employers, legal status in the country are the most common reasons why they opt not to participate in legal proceedings but endure the difficult situations they find themselves in.

Notably, while the Forced Labour definition as per ILO Convention 29 applies to all workers, regardless of background, occupation or legal status and the significant changes in the international

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<sup>67</sup> A government funded Legal Aid Bureau in Malaysia is in operation but assistance through this bureau is not rendered to migrant workers.

<sup>68</sup> Malaysia's Legal Aid (Amendment) Act 2017, Act A1548.

<sup>69</sup> *We can't deny foreigners right to legal aid, says lawyer*, FMT News, 2017,

<http://www.freemalaysiatoday.com/category/nation/2017/08/12/we-cant-deny-foreigners-right-to-legal-aid-says-lawyer> [accessed 30 September 2018].

recognition of domestic workers as workers, Malaysia's legal framework still does not provide the necessary legal protection for domestic workers under the current Employment Act 1955. The Act explicitly denies domestic workers the same rights as other workers.<sup>70</sup> Malaysia's WCA also excludes "domestic servants" from the list of occupations which fall under the category "workman", thereby leaving domestic workers without recourse to compensation for injury suffered in the course of their employment. The isolating nature of domestic work and the lack of legal protection leaves domestic workers vulnerable to abuse and forced labour situations.

Victims of forced labour do not always get compensation even if their cases are tried under ATIPSOM. In the event that the labour exploitation element is pursued under WCA<sup>71</sup>, compensation is capped at a maximum of RM25,000 which, in many cases, is an inadequate amount to address the life changing injuries that migrant workers sustain. Many injured and deceased migrant workers are left uncompensated because either the employers do not maintain the insurance or do not know or do not want to file the claim. MOHR has no outreach initiatives regarding obligations under the WCA. The WCA is outdated and compensation amounts are insufficient to provide adequate compensation. The procedures are not simple, and give too much power to the employer. The CEACR noted in its observation on Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19) that "foreign workers employed in Malaysia for up to five years who become victims of industrial injuries, are denied their fundamental right to equality of treatment with national workers and thus deprived of, inter alia, lifelong pensions in case of permanent disability."<sup>72</sup>

During this process the migrant worker is not allowed to work and this restriction poses financial difficulties for migrants who, without access to the labour market, do not have the means to support themselves whilst in the country. CSOs and trade unions have voiced concerns that this requirement infringes migrants' access to justice and remedies.

Migrant workers have access to the courts and do at times obtain satisfactory judgements. However, many, especially undocumented workers, even if they are victims of forced labour, are still reluctant to pursue remedies in the court or seek redress at the Labour Department. The ILO report 'Access to Justice for Migrant Workers in South-East Asia' indicated that service providers relied on informal mediation to resolve cases in Malaysia (53%), which is reportedly due to slow and ineffective administrative mechanisms. Most often lawyers, case workers, CSOs and union representatives mediate compensation with employers or agents either for non-payment of wages or permission to return to the country of origin before the expiry of the work permit. This is partly due to the difficulty in migrant workers' access to justice, and such mediation is therefore a more favourable option among workers themselves. Unfortunately, compensation very rarely, if ever, reflects loss of earnings, harm done for physical or psychological trauma and expenses incurred. It is also very common for negotiated settlements to reflect only a proportion of wages owed as opposed to the full amount.

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<sup>70</sup> These exclusions are on maternity protections, including leave and allowance entitlements (furthermore, employment contracts prohibit pregnancy); one rest day per week; provisions limiting hours of work, including specifying that employees should not work more than five consecutive hours without a period of leisure of not less than thirty minutes and employees should not work for more than 48 hours in one week; paid public holidays; annual leave entitlements; sick leave; and termination, lay-off and retirement benefits. There is a blanket 14 day period of notice of termination for domestic period, regardless of length of employment.

<sup>71</sup> Employers cannot get work permit if WCA is not paid.

<sup>72</sup> In its successive long-standing comments to the government, the CEACR has continuously recalled that, since 1 April 1993, the national legislation provided for foreign workers, employed in Malaysia for up to five years, to be transferred from the Employees' Social Security Scheme (ESS), which provided for periodical payments to victims of industrial accidents, to the Workmen's Compensation Scheme (WCS), which guaranteed only a lump-sum payment of a significantly lower amount. See:

[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100\\_COMMENT\\_ID:3499314](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3499314).

Most migrants return home without pursuing any redress or obtaining any compensation for the losses they have suffered and usually bear the cost of the travel documents, fines and flights. According to a 2015 report by the UN Special Rapporteur on Trafficking in Persons, many of the same factors that previously limited the effectiveness of the law enforcement responses to trafficking remain, including insufficient coordination and capacity; and corruption of officials (Giammarinaro, 2015). Given the limited access to legal representation, workers often plead guilty to offences they have not committed and this has a negative bearing for their future employment and migration.

CSOs also cite the lack of support from some Embassies as a major roadblock in pursuing cases. According to them, some Embassies advise workers to leave the country instead of pursuing a claim against an employer.

## 5.7 International cooperation

### **Forced Labour Protocol Article 5**

Members shall cooperate with each other to ensure the prevention and elimination of all forms of forced or compulsory labour.

In March 2018, Malaysia signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which is a free trade agreement involving 11 countries in the Pacific region, including Australia, Brunei, Canada, Chile, Japan, Mexico, New Zealand, Peru, Singapore and Vietnam. Article 19.6 of the CPTPP Labour Chapter specifically deals with Forced or Compulsory Labour. It states that “each Party recognizes the goal of eliminating all forms of forced or compulsory labour, including forced or compulsory child labour. Taking into consideration that the Parties have assumed obligations in this regard under Article 19.3 (Labour Rights), each Party shall also discourage, through initiatives it considers appropriate, the importation of goods from other sources produced in whole or in part by forced or compulsory labour, including forced or compulsory child labour.”

The ‘ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers’ was adopted in November 2017. Receiving countries, such as Malaysia, have certain obligations such as: the implementation of an employer education program for hiring migrants; taking appropriate actions against employers who illegally detain migrant workers and who wilfully destroy, mutilate or confiscate a migrant workers’ passports and work permits issued by any government agency and the prohibition of overcharging placement or recruitment fees chargeable to migrant workers. The Consensus is non-binding, and implementation of the articles is subject to national laws, policy and regulations of ASEAN member states.

According to the 2016 ILO Review of Labour Migration Policy in Malaysia<sup>73</sup>, the country “has negotiated bilateral MOUs to manage labour migration dating as far back as 1984. More recently, MOUs have been signed with Sri Lanka, China, Thailand, Bangladesh, Pakistan, India, Viet Nam and Indonesia. In many cases, however, problems with abuse and deception have persisted despite the existence of a formal process for labour migration, contributing to diplomatic tensions and even moratoriums on placement of workers.

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<sup>73</sup> The most recent on July 2018 is Nepal’s moratorium of sending workers to Malaysia due to alleged discrepancies in the hiring process, exacerbating a shortage of guards for local security firms. See: <https://www.malaymail.com/s/1656896/nepal-bars-citizens-from-seeking-work-in-malaysia-over-visa-grouses>

Exploitation of domestic workers is a key issue that the MOUs have sought to address, with the Philippines, Indonesia and Cambodia all halting deployment at various points. While increasing protection for some groups of domestic workers in Malaysia, a fundamental problem with using these agreements as an instrument for change is that they apply on the basis of nationality rather than for the sector as a whole. Therefore, they can have the unintended effect of institutionalizing discriminatory practices towards certain nationalities of domestic workers, rather than enabling the more egalitarian improvements that could be achieved through national legislation.”

Due to confidentiality, copies of these MOUs have not been shared with the ILO and the consultants for this study. Labour protection measures indicated in the MOUs should be free from ambiguity and loopholes that can be exploited by employers to the detriment of the workers. Any conflict between the provisions of the Memoranda and existing laws must be resolved in favour of prevailing laws. These MOUs should also consider the vulnerabilities of workers who are not fully protected by the laws and their lack of bargaining power to negotiate for their labour rights as in the case of domestic workers.

Malaysia is a member of Bali Process enabling it to link with other regional and multilateral forums to improve coordination of activities, and share relevant resources, expertise and lessons learned. It is also a member of the Australia-Asia Program to Combat Trafficking in Persons that aims to strengthen the criminal justice response to trafficking at a national level in Cambodia, Indonesia, Laos, Burma, Philippines, Thailand and Vietnam, with Singapore, Malaysia and Brunei Darussalam involved through regional forums.

The ‘ASEAN Labour Minister Workplan’ has identified as an immediate target by 2020, “Reduced incidence of workers in vulnerable situations, including forced labour, in ASEAN Member States.” Likewise, the previous Malaysian Government, through its Foreign Minister Datuk Seri Anifah Aman pledged its commitment to end forced labour, modern slavery and human trafficking at the 72nd United Nations General Assembly in New York in 2017, indicating that Malaysia accords such commitment the highest priority in accordance with the 2030 Agenda for Sustainable Development. The Minister also recognized that the solution to the complex issue requires collective efforts, not only by the States but also by other stakeholders, especially civil society and the private sector.

Among the initiatives on forced labour that could be achieved through international cooperation are: harmonization of procedures on identifying forced labour victims, cross-border litigation, stronger dialogue and actions related to responsibilities of both source and host countries in their roles in preventing forced labour and protecting and providing access to legal remedies to victims of forced labour.

The government is also making use of technical assistance from United Nations agencies such as the ILO, IOM, UNHCR and UNODC to address human trafficking and forced labour issues. At the national level, further strengthening of collaboration with workers and employers organizations, different national CSOs, academia and think-tanks needs to take place.

## 6 Conclusions and recommendations

As Malaysia's labour market policies undergo transformation, procedural safeguards that protect and prevent vulnerable groups from falling prey to forced labour and other forms of labour exploitation are needed. The task to combat forced labour is a complex and arduous given the intricacies of labour relations and the supply chain structures that workers, particularly migrants, refugees and asylum-seekers find themselves engaged in.

Recent revisions to ATIPSOM mark a new phase in the journey to tackle human trafficking and related forms of exploitation such as forced labour. Today there is much more engagement and awareness of the issue than ever before and the new Government's Manifesto makes very clear its commitment to uphold human rights. The new government's Manifesto also indicates that it will "ensure protection of workers' rights is at par with international standards and which adhere to conventions established by the International Labour Organization (ILO)". This includes the strengthening of the workers' freedom of association and collective bargaining.<sup>74</sup>

The risk that forced labour issues continue despite significant development in other areas remains unless it is a lens that is used for policy and programme development. Government efforts to understand and address the root causes of forced labour are yet to be seen in practice and to permeate the overall approach for dealing with the issue.

Systematic programming, legal and policy reform and improved technical and institutional capacity to address forced labour are called for. Ensuring a balance of power between employers and employees is important as many vulnerabilities stem from the acute asymmetry of power created by an employer led system. In addition, elimination of forced labour demand improved working and living conditions, strengthened employers' accountability and access to justice and remedies for all workers,. Upholding workers' freedom of association are vital in the prevention of labour exploitation and protection of workers from forced labour. Finally, identifying and addressing legal, structural and institutional constraints that might prevent effective enforcement are crucial.

The role of Malaysia as an economic leader in the ASEAN and beyond is undeniable. This status is built on the many industries that employ vulnerable migrant workers. Just as these industries are valuable national assets for the Malaysian Government workers who contribute to this development must also be valued and provided with protection. The roadmap to ratification of the ILO Forced Labour Protocol (P29) presents the best opportunity available to the Government to protect vulnerable workers and prevent the exploitation of their rights.

*In the ILO's Declaration of Philadelphia of 1944, the international community recognized that "labour is not a commodity". Economic development should include the creation of jobs and working conditions in which people can work in freedom, safety and dignity. In short, economic development is not undertaken for its own sake but to improve the lives of human beings; international labour standards are there to ensure that it remains focused on improving human life and dignity.<sup>75</sup>*

<sup>74</sup> Pakatan Harapan Manifesto's Promise 35 is on "raising the dignity of workers and creating more quality jobs".

<sup>75</sup> The benefits of International Labour Standards, ILO, <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang--en/index.htm> [accessed 30 Sept 2018]

## Recommendations

### ILO Forced Labour Protocol ratification

The ILO C29 that Malaysia ratified is supplemented by the Forced Labour Protocol<sup>76</sup>, which tackles issues that are relevant to the country. The ratification emphasizes and strengthens the Government's commitment to preventing and suppressing trafficking and forced labour, protecting and assisting victims, and bringing perpetrators to justice. It is an opportunity to gain international visibility for the Government's efforts to improve laws, policies and practices in this regard. The ILO supervisory mechanisms also provide for the possibility of ILO technical assistance to help promote and apply ratified instruments. For instance, it can contribute to awareness-raising campaigns, provide capacity building to strengthen the role of employers' and workers' organizations and advise governments on the development and implementation of relevant laws, policies and programmes.

### Sub-NAP on forced labour under the NAP on Trafficking in Persons

While the existing NAP-TIP has identified interventions related to forced labour, these are insufficient to achieve significant results on reducing or eliminating this abusive labour practices. However, it is acknowledged that it is a good starting point for developing a much more comprehensive plan on forced labour, still within the same framework because of its established structure, monitoring and implementation mechanism and resource allocation. Such plan on forced labour should be developed through an evidence-based tripartite consultation process.

### Re-ratification of the ILO Convention on the Abolition of Forced Labour (C105)

The ILO Convention on the Elimination of Forced Labour (C105) was designed to supplement Convention No. 29, and focuses on the abolition of certain forms of forced or compulsory labour constituting a violation of human rights.<sup>77</sup> The Convention prohibits use of forced or compulsory labour as a means of coercion, discipline or punishment (as appropriate) against a range of activities. These comprise the freedom to express political or ideological views (which may be exercised orally and through the press and other communications media), as well as various other generally recognized rights, such as the right of association and of assembly, through which citizens seek to secure the dissemination and acceptance of their views and the adoption of policies and laws reflecting them, and which also may be affected by measures of political coercion.<sup>78</sup> The government may wish to avail of ILO technical assistance in conducting a Gap Analysis on C105.

### Increase prevention of forced labour

**Awareness raising:** Based on the stakeholder consultations and ILO supervisory bodies' reports from the government of Malaysia, efforts to raise awareness about workers' rights include mandatory Employers' Undertaking briefings, sectorial awareness raising and roadshows in coordination with

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<sup>76</sup> So far in Asia, only Thailand has ratified the Forced Labour Protocol. 50ForFreedom is a global campaign led by the ILO, together with the International Trade Union Confederation and the International Organization of Employers, to mobilize public support as part of the push to get at least 50 countries to ratify the Protocol by 2018.

<sup>77</sup> Under ILO C105, each Member of the International Labour Organization which ratifies the Convention undertakes to suppress and not to make use of any form of forced or compulsory labour: (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; (b) as a method of mobilising and using labour for purposes of economic development; (c) as a means of labour discipline; (d) as a punishment for having participated in strikes; (e) as a means of racial, social, national or religious discrimination.

<sup>78</sup> ILO: *General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)*, 2007.

different employers' associations in each sector. These efforts were made through National Human Resources Consultative Council and as part of nationwide awareness raising when the Minimum Wage Order of 2012 was released. There are also efforts involving placing banners in Immigration and Customs checkpoints and announcements on aircrafts about the potential punishments for persons involved in trafficking in persons. Forced labour, being part of trafficking is included in these awareness initiatives, however, without clear illustrations and examples, understanding of forced labour may be limited to extreme cases and would fail to show the importance of non-visible indicators of forced labour and psychological coercion.

A national campaign on forced labour could also benefit the anti-trafficking and anti-labour exploitation efforts of the country on a broader scale. The government has the available multimedia means for disseminating information about forced labour to the workers, employers and the public and it could partner with other organizations to develop or use the forced labour materials.

**Protection of workers' from falling into an irregular situation:** Providing a victim-centred legal mechanism that enables termination of an employment relationship lawfully in cases of legal rights violations, and allowing labour market mobility that is beneficial to industries' labour requirements would necessitate a review by the government of its migrant workers' sponsorship system. Such review could also examine mechanisms to give workers more ownership and engagement in the processes of renewal of work permits and control over their identity documents. This would eliminate the excessive dependency of workers on employers which is, in itself, a big vulnerability to forced labour and could also help eliminate passport retention practices by employers. Giving workers better access to the work permit system will help in preventing workers becoming undocumented due to employers' acts or omissions in the renewal process, for example. If workers are subjected to coercion to renew their contract, allowing the worker to engage with the renewal system will allow that person to voice such issues.

**Promote Freedom of Association:** Freedom of association for migrant workers is a critical means of ensuring that workers have the ability to participate in collective bargaining and be represented in airing grievances and seek redress. It plays an important role in the prevention of forced labour and in ensuring that some of the imbalances of power between employer and employee are addressed.

**Improving recruitment practices:** Malaysia's recruitment policies have changed in recent years, with the amendment of the Private Employment Agencies Act and the current zero-fee levy policy for workers. However, there are important hurdles left to overcome: further reducing the recruitment cost for the employers while ensuring that they are complying with labour policies and affording all their workers protection to avoid a race-to-the-bottom situation on workers' rights; ensuring that employers are not passing on their costs to employees by way of illegal salary deductions; strictly enforcing the requirements for having written employment contracts; restricting passport retention; ensuring employer accountability in respect of acquiring necessary legal documentation for workers and that workers are not held legally liable for such failure by employers.

**Legal reform and improved enforcement of the laws:** Forced labour as a legal concept is not defined in any piece of legislation in Malaysia although it is a form of exploitation criminalized under ATIPSOM. Interestingly, the Penal Code criminalizes anyone who "unlawfully compels any person to labour against the will of that person". In practice, this provision of the Penal Code is considered to be too lenient a penalty to be applied to forced labour cases. As a result, the existence of this provision criminalizing forced labour does not, in practice, improve the protection available to victims of forced labour under the law.

For a forced labour victim, the reality of accessing a remedy under the existing ATIPSOM legislation would require demonstrating coercion as defined in ATIPSOM. It is important to recognize that several situations that would amount to forced labour under the ILO definition do not meet the stringent definition of coercion under ATIPSOM. These cases fall through the cracks as they are heard by labour courts or tribunals as labour violations, but not necessarily as forced labour. Victims of such cases also do not benefit from the protection of the non-criminalization provision in the ATIPSOM.

The following steps are recommended to ensure that **all** victims of forced labour in Malaysia are recognized and afforded equal protection by the law:

- A clear definition of forced labour in line with the ILO Convention 29 and a recognition in law of the central elements of the definition such as: consent and the menace or threat of penalty and with regard to indicators of forced labour such as, but not limited to, deception, psychological coercion, and debt bondage.
- A recognition in legislation that forced labour can occur independently of human trafficking.
- A revision of the ATIPSOM definition of coercion to recognize other critical elements such as psychological coercion, deception, fraud and abuse of vulnerabilities. Furthermore, It is suggested to consider doing an assessment whether ample time is given to determine if an individual is a victim of trafficking or not, giving victims of trafficking access to legal counsel of their choice, providing for Prosecutors' consultation with the witnesses' weeks ahead of trial, reviewing provisions for victim compensation and incorporating corporate liability in ATIPSOM.
- Increasing the Penal Code penalties to provide for more effective deterrence from compulsory labour offences.

The Employment Act 1955 must be amended to recognize and accord all benefits under the Act to domestic workers as workers and domestic work as work. Protecting domestic workers under the law will help to curb abuse against them and bring some formality of protection to an informal sector that is largely unregulated. This could eventually lead to a reduction of costs for the Government in dealing with victims, prosecutions and detention.

Implementation of the Passport Act should be strengthened and development of implementing regulations is recommended to address the current gaps in enforcement and awareness (i.e. requiring employers to post notices about workers' rights to keep their passports). Reviewing this Act could include providing higher fines and more serious consequences for repeat offenders. This will deter employers from retaining passports which is a means of coercion of workers for forced labour. Over time, this could result to decrease in labour violations, including forced labour incidences. A related issue is the need to tackle the fear of becoming or being an undocumented as a means of oppression that keeps workers tied to situations of abuse. A validation of the worker's identity could be done by their consulate or embassy or Malaysian government verification. This will save the Government significant costs in prosecuting and detaining individuals who are victims, whilst also providing workers with the assurance that they can leave an exploitative situation without their document because their identity could be verified by their consulate.

**Improve living conditions of workers:** Improving living conditions for workers is very likely to reduce vulnerabilities to forced labour and other forms of exploitation. For example, the Workers' Minimum Standards of Housing and Amenities Act must be amended to be consistent with ILO Workers' Housing Recommendation, 1961 (No. 115). The government could consider extending coverage to other sectors beyond estates and mining and improve provisions taking into consideration the

general well-being of workers as well as providing safe and freely accessible facilities for storing workers' passports and other valuables.

**Digitise payments to workers:** A further way of improving protection from forced labour is to address the issue of unauthorized wage deduction or retention by digitising payment to workers. Measures could be put in place to require employers to document or digitise payment of worker wages and to stop employers from passing on to workers any recruitment costs including processing fees for work permits, in the form of salary deductions. Documentation and digitisation bring a welcome dimension of transparency, accountability and can also be used as evidence in proceedings. For example, an employer who passes recruitment costs to a worker by means of illegal deductions will be identifiable where there is clear and transparent recording of payments made. This will also enable workers to better assess how much outstanding debt they have to their employers so that they do not end up in debt bondage. It could give workers better understanding of wage arrears, if any.

### Improve protection of victims of forced labour

Better enforcement of the law is absolutely critical for the protection of workers and for deterrence purposes. The government's enforcement strategy should seriously take into consideration human rights and victim protection. Better enforcement also requires improved coordination and capacity between different enforcement agencies as well as the development of guidelines for coordination and tackling of forced labour issues incorporating clear illustrations.

Domestic workers are workers and they must therefore enjoy the same protection under the law as other workers do. Protecting domestic workers under the law will help to curb abuse against them and bring some formality of protection to an informal sector that is largely unregulated.

Employers should be held accountable for violation of Passports Act. Enforcement agencies must ensure that in an event that a migrant is found to have no legal papers, proper screening is done to determine whether the lack of documentation is a result of employers' fault, that may be linked to forced labour or trafficking, or otherwise. In this case, re-victimization of forced labour or trafficking victims through unfair detention or arrest is avoided.

Implementation of the Immigration Act vis-à-vis other laws such as ATIPSOM and labour laws should make sure that proper screening for forced labour and trafficking victims is done first, and that it must not discourage workers - regardless of legal status - from reporting grievances/abuses committed to them by their employers, which could result to continuation or aggravation of exploitation.

### Improve access of victims to legal remedies

Victims of forced labour do not always get compensation even if their cases are tried under ATIPSOM. In the event that the labour violation is pursued under the Workers' Compensation Act (WCA), compensation is capped at a maximum of RM25,000 which is an inadequate amount given the life changing injuries that migrant workers sustain. Many injured and deceased migrant workers are left uncompensated because either the employers neither maintain insurance nor know nor want to file the claim. As a "Follow-up to the conclusions of the Committee on the Application of Standards (International Labour Conference, 106th Session, June 2017)", specifically, the Committee called upon the Government to, without delay:

- (i) take steps to develop and communicate its policy for governing the recruitment and treatment of migrant workers;
- (ii) take immediate steps to conclude its work on the means of reinstating the equality of treatment of migrant workers, in particular by extending the coverage of the ESS to migrant workers in a form that is effective;
- (iii) work with employers' and workers' organizations to develop laws and regulations that ensure the removal of discriminatory practices between migrant and national workers, in particular in relation to workplace injury;
- (iv) adopt special arrangements with other ratifying member States to overcome the administrative difficulties of monitoring the payment of compensation abroad;
- (v) take necessary legal and practical measures to ensure that migrant workers have access to medical care in the case of workplace injury without fear of arrest and retaliation; and
- (vi) avail itself of the technical assistance of the ILO with a view to implementing these recommendations and to develop mechanisms for overcoming the practical issues affecting implementation of the domestic social security scheme to migrant workers.

According to the ILO study on Access to Justice of Migrant Workers (2017), the mechanisms for assistance with dispute resolution, administrative complaint mechanisms, and criminal and court hearing proceedings are established in legislation but not always accessible in practice.

In the event of a breach of labour rights, workers can lodge a complaint with the Labour Department and with the Industrial Relations Department. The Labour Department is mandated to accept complaints relating to violations of the Employment Act, the Minimum Wage Order, the Workers' Minimum Standard of Housing and Amenities Act, the Workmen's Compensation Act, and the Anti-Trafficking of Persons and Smuggling of Migrants Act. The Industrial Relations Department is responsible for resolving cases of unfair dismissal, filed under Section 20 of the Industrial Relations Act.<sup>79</sup>

ATIPSOM provides for protection of victims from prosecution and penalty for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to trafficking and also where they are subjected to forced or compulsory labour within such context. It is important to note that given the lack of clarity in relation to the identification of forced labour it is highly likely that a forced labour case may be dealt with under the Employment Act in which case protection of victims from prosecution/penalty under ATIPSOM will not apply. The crime of forced labour in ATIPSOM must be defined so that it is brought in line with the definition set out in ILO Convention 29. Greater conceptual clarity and identification of features distinguishing the crime of trafficking from forced labour is essential to ensure that forced labour victims are identified and forced labour cases are prosecuted as to correspond to the gravity of the situation in forced labour cases. Conceptual clarity will allow for better enforcement and the creation of jurisprudence in this space.

Migrant workers have access to the courts and do at times obtain satisfactory judgements. Malaysia's courts have affirmed the rights of non-citizens to equality before the law. However, during the court proceedings the migrant worker is not allowed to work and this restriction poses financial difficulties for migrants who do not have the means to support themselves without access to the labour market. Often lawyers, case workers, CSOs and union representatives mediate compensation with employers or agents either for non-payment of wages or permission to return to the country of origin before the expiry of the work permit. Compensation very rarely, if ever, reflects

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<sup>79</sup> A government funded Legal Aid Bureau in Malaysia is in operation but assistance through this bureau is not rendered to migrant workers.

financial losses, harm done and physical or psychological trauma suffered by the victim. It is also very common for negotiated settlements to reflect only a proportion of wages owed as opposed to the full amount. Most migrants return home without any redress for the losses they have suffered and they usually bear the cost of the travel documents, fines and flights. Given limited access to legal representation, workers often plead guilty to offences they have not committed and this has a negative bearing to their future employment and migration.

The MTUC and members of CSOs have identified forced labour cases by accepting complaints from victims. Due to their victim-centred approach and services, victims are most likely to seek help from these organizations. Few NGOs however have a good working relationship with government authorities. Trust-building between these organizations is important to enable effective coordination toward the collective goal of improving workers' rights. Some victims also lack trust in the justice system and its ability to protect them. Changing this perception would require assurance of victim safety and protection and a commitment to ensure that such protection is embodied in legislation. A safe and secure feedback mechanism and complaints system is needed that does not result in victims being disadvantaged for reporting exploitation and seeking enforcement of their rights.

The government could look into the possibility of waiving fees associated with pass to remain in Malaysia and seek alternative employment, provided through the Labour Department for foreign workers who are involved in any labour violation.

The existing referral system for trafficking could be enhanced to ensure that all forms of forced labour are acted upon. MAPO's monitoring and analysis of the cases referred through the referral system could determine its functionality and identify areas for further improvement. Good examples of victim protection and access to legal remedies could be popularized to increase victims' confidence in the justice system and to report the incidence of forced labour to authorities.

The 2017 ILO study on 'Access to Justice for Migrant Workers in South-East Asia' showed that the most common remedy provided to migrants in Malaysia was return to their country of origin, which was an outcome for 63 per cent of complaint cases. Some of these cases involved migrant workers who were provided with shelter services after enduring forced labour – and returning home was a high priority. However, in other cases, considering repatriation to be a 'remedy' may be a mischaracterization due to the loss of income, loss of opportunity and investment in migration costs.

Extending access to legal aid for all criminal, civil and immigration matters, including consideration of expansion of the coverage of the NLA to support migrant workers, refugees and asylum-seekers is vital. Restricting free access to legal aid makes migrant workers, refugees and asylum-seekers more vulnerable and at risk of exploitation. Many plead guilty to offences they did not commit in order to avoid detention. Allowing representation will ensure that the real criminals or perpetrators are held accountable and that victims' voices are represented and heard. Allowing legal representation will also help redress the imbalance of power between employers and employees.

The government could invest in more State-level shelter homes, especially in areas where transport to the nearest shelter may be difficult and costly. This is also to avoid overcrowding and the inherent difficulties of managing a large number of victims in limited facilities. Shelters could also improve in their psychosocial and livelihood support to victims, with due consideration of the trauma, physical, mental and financial difficulties endured by the victims. The services of expert psychologists in shelters and in courts would greatly assist in determining the psychological condition of victims.

Furthermore, reviewing the policy on special passes and issuance to migrant workers who are pursuing a legal claim in Malaysia will ensure that victims are allowed to continue to stay in the country and to work to be able to support themselves.

### Enhance cooperation with international and national partners

Many vulnerabilities to forced labour are created in countries of origin and many of those accountable for exploitation are located in different jurisdictions. Hence, bilateral engagement between source countries and Malaysia is essential to facilitate cooperation in cross-border cases and to promote understanding of issues originating in source countries and how these exacerbate vulnerabilities of workers to forced labour. The CEACR has encouraged the Government to continue to negotiate bilateral agreements with countries of origin, to ensure their full and effective implementation, so that migrant workers were protected from abusive practices and conditions that amounted to the exaction of forced labour once they were in the country, and to work with the countries of origin to take measures for their protection prior to departure.<sup>80</sup> Bilateral cooperation should identify the roles of the country of origin and country of destination. MOUs should contain provisions requiring recruitment agencies and employers to provide workers with valid written contracts in their own language, prohibiting passport retention, and other legal protections. It is important that such agreements and MOUs do not contain provisions that may be detrimental to workers' protection and likely put them at risk of forced labour.

Improving cooperation also requires inclusive policy and programme development and implementation in collaboration with workers, employers and other relevant stakeholders for a more holistic approach to combating forced labour. Certification and regulatory bodies are key partners for the government in the elimination of forced labour as they could institutionalize strict no-forced-labour policies in their work.

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<sup>80</sup> *Individual Case (CAS) – Discussion:2013, Publication: 102<sup>nd</sup> ILC Session (2013)*, ILO, 2013, [https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3131340](https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3131340) [accessed 30 Sept 2018]

## **Annex A: Text of the ILO instruments**

### **Forced Labour Convention, 1930 (No. 29)**

#### *Article 1*

1. Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.

[...]

#### *Article 2*

1. For the purposes of this Convention the term “forced or compulsory labour” shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

2. Nevertheless, for the purposes of this Convention, the term “forced or compulsory labour” shall not include –

(a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;

(b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;

(c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;

(d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;

(e) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

[...]

#### *Article 25*

The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced.

[...]

### **Protocol of 2014 to the Forced Labour Convention, 1930**

#### *Preamble*

The General Conference of the International Labour Organization,  
Having been convened at Geneva by the Governing Body of the International Labour Office,  
and having met in its 103rd Session on 28 May 2014, and

Recognizing that the prohibition of forced or compulsory labour forms part of the body of fundamental rights, and that forced or compulsory labour violates the human rights and dignity of millions of women and men, girls and boys, contributes to the perpetuation of poverty and stands in the way of the achievement of decent work for all, and

Recognizing the vital role played by the Forced Labour Convention, 1930 (No. 29), hereinafter referred to as “the Convention”, and the Abolition of Forced Labour Convention, 1957 (No. 105), in combating all forms of forced or compulsory labour, but that gaps in their implementation call for additional measures, and

Recalling that the definition of forced or compulsory labour under Article 2 of the Convention covers forced or compulsory labour in all its forms and manifestations and is applicable to all human beings without distinction, and

Emphasizing the urgency of eliminating forced and compulsory labour in all its forms and manifestations, and

Recalling the obligation of Members that have ratified the Convention to make forced or compulsory labour punishable as a penal offence, and to ensure that the penalties imposed by law are really adequate and are strictly enforced, and

Noting that the transitional period provided for in the Convention has expired, and the provisions of Article 1, paragraphs 2 and 3, and Articles 3 to 24 are no longer applicable, and

Recognizing that the context and forms of forced or compulsory labour have changed and trafficking in persons for the purposes of forced or compulsory labour, which may involve sexual exploitation, is the subject of growing international concern and requires urgent action for its effective elimination, and

Noting that there is an increased number of workers who are in forced or compulsory labour in the private economy, that certain sectors of the economy are particularly vulnerable, and that certain groups of workers have a higher risk of becoming victims of forced or compulsory labour, especially migrants, and

Noting that the effective and sustained suppression of forced or compulsory labour contributes to ensuring fair competition among employers as well as protection for workers, and

Recalling the relevant international labour standards, including, in particular, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Equal Remuneration Convention, 1951 (No. 100), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Minimum Age Convention, 1973 (No. 138), the Worst Forms of Child Labour Convention, 1999 (No. 182), the Migration for Employment Convention (Revised), 1949 (No. 97), the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), the Domestic Workers Convention, 2011 (No. 189), the Private Employment Agencies Convention, 1997 (No. 181), the Labour Inspection Convention, 1947 (No. 81), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), as well as the ILO Declaration on Fundamental Principles and Rights at Work (1998), and the ILO Declaration on Social Justice for a Fair Globalization (2008), and

Noting other relevant international instruments, in particular the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Slavery Convention (1926), the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956), the United Nations Convention against Transnational Organized Crime (2000), the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000), the Protocol against the Smuggling of Migrants by Land, Sea and Air (2000), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Convention on the Elimination of All Forms of Discrimination against Women (1979), and the Convention on the Rights of Persons with Disabilities (2006), and

Having decided upon the adoption of certain proposals to address gaps in implementation of the Convention, and reaffirmed that measures of prevention, protection, and remedies, such as compensation and rehabilitation, are necessary to achieve the effective and sustained suppression of forced or compulsory labour, pursuant to the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Protocol to the Convention; adopts this eleventh day of June two thousand and fourteen the following Protocol, which may be cited as the Protocol of 2014 to the Forced Labour Convention, 1930.

*Article 1*

1. In giving effect to its obligations under the Convention to suppress forced or compulsory labour, each Member shall take effective measures to prevent and eliminate its use, to provide to victims protection and access to appropriate and effective remedies, such as compensation, and to sanction the perpetrators of forced or compulsory labour.

2. Each Member shall develop a national policy and plan of action for the effective and sustained suppression of forced or compulsory labour in consultation with employers' and workers' organizations, which shall involve systematic action by the competent authorities and, as appropriate, in coordination with employers' and workers' organizations, as well as with other groups concerned.

3. The definition of forced or compulsory labour contained in the Convention is reaffirmed, and therefore the measures referred to in this Protocol shall include specific action against trafficking in persons for the purposes of forced or compulsory labour.

*Article 2*

The measures to be taken for the prevention of forced or compulsory labour shall include:

- (a) educating and informing people, especially those considered to be particularly vulnerable, in order to prevent their becoming victims of forced or compulsory labour;
- (b) educating and informing employers, in order to prevent their becoming involved in forced or compulsory labour practices;
- (c) undertaking efforts to ensure that:
  - (i) the coverage and enforcement of legislation relevant to the prevention of forced or compulsory labour, including labour law as appropriate, apply to all workers and all sectors of the economy; and
  - (ii) labour inspection services and other services responsible for the implementation of this legislation are strengthened;
- (d) protecting persons, particularly migrant workers, from possible abusive and fraudulent practices during the recruitment and placement process;
- (e) supporting due diligence by both the public and private sectors to prevent and respond to risks of forced or compulsory labour; and
- (f) addressing the root causes and factors that heighten the risks of forced or compulsory labour.

*Article 3*

Each Member shall take effective measures for the identification, release, protection, recovery and rehabilitation of all victims of forced or compulsory labour, as well as the provision of other forms of assistance and support.

*Article 4*

1. Each Member shall ensure that all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies, such as compensation.

2. Each Member shall, in accordance with the basic principles of its legal system, take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.

*Article 5*

Members shall cooperate with each other to ensure the prevention and elimination of all forms of forced or compulsory labour.

*Article 6*

The measures taken to apply the provisions of this Protocol and of the Convention shall be determined by national laws or regulations or by the competent authority, after consultation with the organizations of employers and workers concerned.

*Article 7*

The transitional provisions of Article 1, paragraphs 2 and 3, and Articles 3 to 24 of the Convention shall be deleted.

[...]

## Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203)

*Preamble*

The General Conference of the International Labour Organization,  
Having been convened at Geneva by the Governing Body of the International Labour Office,  
and having met in its 103rd Session on 28 May 2014, and

Having adopted the Protocol of 2014 to the Forced Labour Convention, 1930, hereinafter referred to as "the Protocol", and

Having decided upon the adoption of certain proposals to address gaps in implementation of the Forced Labour Convention, 1930 (No. 29), hereinafter referred to as "the Convention", and reaffirmed that measures of prevention, protection, and remedies, such as compensation and rehabilitation, are necessary to achieve the effective and sustained suppression of forced or compulsory labour, pursuant to the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation supplementing the Convention and the Protocol;

adopts this eleventh day of June of the year two thousand and fourteen the following Recommendation, which may be cited as the Forced Labour (Supplementary Measures) Recommendation, 2014.

1. Members should establish or strengthen, as necessary, in consultation with employers' and workers' organizations as well as other groups concerned:

(a) national policies and plans of action with time-bound measures using a gender- and child-sensitive approach to achieve the effective and sustained suppression of forced or compulsory labour in all its forms through prevention, protection and access to remedies, such as compensation of victims, and the sanctioning of perpetrators; and

(b) competent authorities such as the labour inspectorates, the judiciary and national bodies or other institutional mechanisms that are concerned with forced or compulsory labour, to ensure the development, coordination, implementation, monitoring and evaluation of the national policies and plans of action.

2. (1) Members should regularly collect, analyse and make available reliable, unbiased and detailed information and statistical data, disaggregated by relevant characteristics such as sex, age and nationality, on the nature and extent of forced or compulsory labour which would allow an assessment of progress made.

(2) The right to privacy with regard to personal data should be respected.

*PREVENTION*

3. Members should take preventive measures that include:

(a) respecting, promoting and realizing fundamental principles and rights at work;

- (b) the promotion of freedom of association and collective bargaining to enable at-risk workers to join workers' organizations;
- (c) programmes to combat the discrimination that heightens vulnerability to forced or compulsory labour;
- (d) initiatives to address child labour and promote educational opportunities for children, both boys and girls, as a safeguard against children becoming victims of forced or compulsory labour; and
- (e) taking steps to realize the objectives of the Protocol and the Convention.

4. Taking into account their national circumstances, Members should take the most effective preventive measures, such as:

- (a) addressing the root causes of workers' vulnerability to forced or compulsory labour;
- (b) targeted awareness-raising campaigns, especially for those who are most at risk of becoming victims of forced or compulsory labour, to inform them, inter alia, about how to protect themselves against fraudulent or abusive recruitment and employment practices, their rights and responsibilities at work, and how to gain access to assistance in case of need;
- (c) targeted awareness-raising campaigns regarding sanctions for violating the prohibition on forced or compulsory labour;
- (d) skills training programmes for at-risk population groups to increase their employability and income-earning opportunities and capacity;
- (e) steps to ensure that national laws and regulations concerning the employment relationship cover all sectors of the economy and that they are effectively enforced. The relevant information on the terms and conditions of employment should be specified in an appropriate, verifiable and easily understandable manner, and preferably through written contracts in accordance with national laws, regulations or collective agreements;
- (f) basic social security guarantees forming part of the national social protection floor, as provided for in the Social Protection Floors Recommendation, 2012 (No. 202), in order to reduce vulnerability to forced or compulsory labour;
- (g) orientation and information for migrants, before departure and upon arrival, in order for them to be better prepared to work and live abroad and to create awareness and better understanding about trafficking for forced labour situations;
- (h) coherent policies, such as employment and labour migration policies, which take into account the risks faced by specific groups of migrants, including those in an irregular situation, and address circumstances that could result in forced labour situations;
- (i) promotion of coordinated efforts by relevant government agencies with those of other States to facilitate regular and safe migration and to prevent trafficking in persons, including coordinated efforts to regulate, license and monitor labour recruiters and employment agencies and eliminate the charging of recruitment fees to workers to prevent debt bondage and other forms of economic coercion; and
- (j) in giving effect to their obligations under the Convention to suppress forced or compulsory labour, providing guidance and support to employers and businesses to take effective measures to identify, prevent, mitigate and account for how they address the risks of forced or compulsory labour in their operations or in products, services or operations to which they may be directly linked.

#### *PROTECTION*

5. (1) Targeted efforts should be made to identify and release victims of forced or compulsory labour.

(2) Protective measures should be provided to victims of forced or compulsory labour. These measures should not be made conditional on the victim's willingness to cooperate in criminal or other proceedings.

(3) Steps may be taken to encourage the cooperation of victims for the identification and punishment of perpetrators.

6. Members should recognize the role and capacities of workers' organizations and other organizations concerned to support and assist victims of forced or compulsory labour.

7. Members should, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.

8. Members should take measures to eliminate abuses and fraudulent practices by labour recruiters and employment agencies, such as:

- (a) eliminating the charging of recruitment fees to workers;
- (b) requiring transparent contracts that clearly explain terms of employment and conditions of work;
- (c) establishing adequate and accessible complaint mechanisms;
- (d) imposing adequate penalties; and
- (e) regulating or licensing these services.

9. Taking into account their national circumstances, Members should take the most effective protective measures to meet the needs of all victims for both immediate assistance and long-term recovery and rehabilitation, such as:

- (a) reasonable efforts to protect the safety of victims of forced or compulsory labour as well as of family members and witnesses, as appropriate, including protection from intimidation and retaliation for exercising their rights under relevant national laws or for cooperation with legal proceedings;
- (b) adequate and appropriate accommodation;
- (c) health care, including both medical and psychological assistance, as well as provision of special rehabilitative measures for victims of forced or compulsory labour, including those who have also been subjected to sexual violence;
- (d) material assistance;
- (e) protection of privacy and identity; and
- (f) social and economic assistance, including access to educational and training opportunities and access to decent work.

10. Protective measures for children subjected to forced or compulsory labour should take into account the special needs and best interests of the child, and, in addition to the protections provided for in the Worst Forms of Child Labour Convention, 1999 (No. 182), should include:

- (a) access to education for girls and boys;
- (b) the appointment of a guardian or other representative, where appropriate;
- (c) when the person's age is uncertain but there are reasons to believe him or her to be less than 18 years of age, a presumption of minor status, pending age verification; and
- (d) efforts to reunite children with their families, or, when it is in the best interests of the child, provide family-based care.

11. Taking into account their national circumstances, Members should take the most effective protective measures for migrants subjected to forced or compulsory labour, irrespective of their legal status in the national territory, including:

- (a) provision of a reflection and recovery period in order to allow the person concerned to take an informed decision relating to protective measures and participation in legal proceedings, during which the person shall be authorized to remain in the territory of the member State concerned when there are reasonable grounds to believe that the person is a victim of forced or compulsory labour;
- (b) provision of temporary or permanent residence permits and access to the labour market; and

(c) facilitation of safe and preferably voluntary repatriation.

*REMEDIES, SUCH AS COMPENSATION AND ACCESS TO JUSTICE*

12. Members should take measures to ensure that all victims of forced or compulsory labour have access to justice and other appropriate and effective remedies, such as compensation for personal and material damages, including by:

- (a) ensuring, in accordance with national laws, regulations and practice, that all victims, either by themselves or through representatives, have effective access to courts, tribunals and other resolution mechanisms, to pursue remedies, such as compensation and damages;
- (b) providing that victims can pursue compensation and damages from perpetrators, including unpaid wages and statutory contributions for social security benefits;
- (c) ensuring access to appropriate existing compensation schemes;
- (d) providing information and advice regarding victims' legal rights and the services available, in a language that they can understand, as well as access to legal assistance, preferably free of charge; and
- (e) providing that all victims of forced or compulsory labour that occurred in the member State, both nationals and non-nationals, can pursue appropriate administrative, civil and criminal remedies in that State, irrespective of their presence or legal status in the State, under simplified procedural requirements, when appropriate.

*ENFORCEMENT*

13. Members should take action to strengthen the enforcement of national laws and regulations and other measures, including by:

- (a) giving to the relevant authorities, such as labour inspection services, the necessary mandate, resources and training to allow them to effectively enforce the law and cooperate with other organizations concerned for the prevention and protection of victims of forced or compulsory labour;
- (b) providing for the imposition of penalties, in addition to penal sanctions, such as the confiscation of profits of forced or compulsory labour and of other assets in accordance with national laws and regulations;
- (c) ensuring that legal persons can be held liable for the violation of the prohibition to use forced or compulsory labour in applying Article 25 of the Convention and clause (b) above; and
- (d) strengthening efforts to identify victims, including by developing indicators of forced or compulsory labour for use by labour inspectors, law enforcement services, social workers, immigration officers, public prosecutors, employers, employers' and workers' organizations, non-governmental organizations and other relevant actors.

*INTERNATIONAL COOPERATION*

14. International cooperation should be strengthened between and among Members and with relevant international and regional organizations, which should assist each other in achieving the effective and sustained suppression of forced or compulsory labour, including by:

- (a) strengthening international cooperation between labour law enforcement institutions in addition to criminal law enforcement;
- (b) mobilizing resources for national action programmes and international technical cooperation and assistance;
- (c) mutual legal assistance;
- (d) cooperation to address and prevent the use of forced or compulsory labour by diplomatic personnel; and

(e) mutual technical assistance, including the exchange of information and the sharing of good practice and lessons learned in combating forced or compulsory labour.

## **Annex B ILO supervision of the application of Convention No. 29 by Malaysia**

### **Committee of Experts on the Application of Conventions and Recommendations**

#### **Observation - adopted 2016, published 106th ILC session (2017)**

*Articles 1(1), 2(1) and 25 of the Convention.* 1. *Vulnerable situation of migrant workers with regard to the exaction of forced labour, including trafficking in persons.* The Committee previously noted the observations submitted by the International Trade Union Confederation (ITUC) in 2013, concerning the situation and treatment of migrant workers in the country which exposes them to abuse and forced labour practices, including: working for long hours; underpayment or late payment of wages; false documentation or contract substitution on arrival; and retention of passports by the employers (an estimated 90 per cent of employers allegedly retain the passports of migrant workers). In this regard, the Committee noted the Government's indication in its report as well as during the discussion in June 2014 of the Committee on the Application of Standards, regarding certain measures taken to protect migrant workers, such as the establishment of a Special Enforcement Team (SET) to enhance enforcement activities to combat forced labour issues; conducting nationwide awareness raising on the Minimum Wages Order of 2012 in order to prevent labour exploitation of migrants; signing of Memoranda of Understanding (MoU) with eight countries of origin (Bangladesh, China, India, Indonesia, Pakistan, Sri Lanka, Thailand and Viet Nam) in order to regulate the recruitment of migrant workers; and signing of a separate MoU on the recruitment and placement of domestic workers with the Government of Indonesia. The Committee requested the Government to continue to take measures to ensure that migrant workers, including migrant domestic workers, are fully protected from abusive practices and conditions that amount to forced labour.

The Committee notes the Government's information, in its report, regarding the measures taken by the Department of Labour to protect migrant workers including, the establishment of a mechanism of recruitment of foreign workers on a government to government (G to G) basis in order to prevent human trafficking and other forced labour practices. The Government states that the G to G mechanism of recruitment of foreign workers will not involve agents, third parties, middle men, private employment agencies or other recruitment agents of both countries, but shall be conducted through the departments appointed by the two countries. The Committee further notes the Government's information that it has signed a G to G MoU with the Government of Bangladesh. Moreover, the Government also introduced a standard bilingual Contract of Employment for all foreign workers as well as a Standard Operating Procedure which requires the employers to pay wages to workers through their bank account and to obtain insurance coverage for foreign workers. The Government also indicates that the SET conducts routine inspections and investigates complaints related to forced labour. According to the data provided by the Government, from 2012 to 2015, the SET carried out 57 investigations related to forced labour concerning 181 victims, and in six cases, penalties of fines ranging from 6,000 to 120,000 Malaysian ringgit (MYR) (MYR1 equivalent to US\$0.26) were imposed on the convicted persons.

The Committee notes that according to the Report of the United Nations Special Rapporteur on trafficking in persons, especially women and children of 15 June 2015 (report of the Special

Rapporteur on trafficking in persons), workers, including domestic workers, are recruited through fraud and deception about the type and conditions of employment by recruitment agents in Malaysia and in source countries. Most commonly they are exploited through breaches of contract, payment of excessive recruitment and immigration fees, reduction or non-payment of salary, excessive working hours, a lack of rest days and conditions akin to debt bondage and servitude. In some cases, foreign workers' vulnerability to exploitation is heightened when employers neglect to obtain proper documentation for workers or employ workers in sectors other than those for which they were granted an employment visa. Moreover practices of employers withholding passports are reportedly common. This report further states that irregular migrants wanting to report abuse, risk exposing themselves to the real danger of being charged for the offence of "irregular entry or stay" and are detained and ultimately deported (A/HRC/29/38/Add.1, paragraphs 10, 11, 12 and 25).

The Committee further notes from the report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea of 8 September 2015 (A/70/362) that nationals of the Democratic People's Republic of Korea, sent abroad by their Government to countries such as Malaysia, work under conditions that reportedly amount to forced labour. These workers who work mainly in the mining, logging, textile and construction industries are forced to work sometimes up to 20 hours per day with one or two rest days per month and without adequate food, health and safety measures; their freedom of movement is restricted and they are forbidden from returning to their country during their assignment; and their passports are confiscated by the security agents and they are threatened with repatriation if they do not perform well or commit infractions. According to this report, the host countries never monitor the working conditions of overseas workers (paragraphs 24, 26, 27 and 28). While taking note of the measures taken by the Government to protect migrant workers, the Committee notes with **deep concern** the continued abusive practices and working conditions of migrant workers that may amount to forced labour, such as passport confiscation by employers, high recruitment fees, wage arrears and the problem of contract substitution. ***The Committee therefore urges the Government to strengthen the measures to ensure that migrant workers, including migrant domestic workers, are fully protected from abusive practices and conditions that amount to forced labour. It requests the Government to provide information on the measures taken in this regard, including information on the implementation of the Government to Government mechanisms for recruiting foreign workers as well as on other bilateral agreements signed with countries of origin. The Committee also requests the Government to provide copies of the bilateral agreements. The Committee further requests the Government to continue to provide information on the activities undertaken by the Special Enforcement Team to combat forced labour and the results achieved.***

2. *Trafficking in persons.* In its previous comments, the Committee noted that during the discussions on the application of the Convention at the Conference Committee in June 2014, the Government reaffirmed its commitment to addressing trafficking in persons and provided information on various measures taken to this end, including measures to strengthen the capacity of law enforcement personnel and awareness-raising initiatives, as well as measures to better protect victims of trafficking. However, the Committee noted that, while the various steps taken by the Government were acknowledged by the members of the Conference Committee, delegates stressed that further measures were necessary in order to develop and implement effective action that is commensurate with the magnitude of the trafficking phenomenon.

The Committee notes the information provided by the Government in its report under the Worst Forms of Child Labour Convention, 1999 (No. 182), that it has elaborated the National Action Plan to Combat Trafficking in Persons 2016–20. This report also indicates that the Government of Malaysia has concluded an MoU with the Government of Thailand in combating trafficking in persons which particularly focuses on protection of victims of trafficking, law enforcement cooperation and the repatriation process. Moreover, it notes from this report that from 2012 to 2015, 746 persons were arrested in 550 cases related to trafficking in persons, involving 1,138 victims.

The Committee further notes the following information contained in the UN Report of the Special Rapporteur on trafficking in persons, regarding the measures taken by the Government to combat trafficking in persons:

- 5,126 awareness-raising campaigns on issues related to trafficking in persons were launched;
- 28 deputy public prosecutors who are specialized in dealing with cases of trafficking in persons were appointed within the Attorney General's Chambers;
- a directive to investigate all cases of trafficking involving foreign nationals under the Anti-Trafficking Act of 2007 as amended in 2010 and renamed as the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (Anti-Trafficking Act) was issued; and
- a government policy allowing victims of labour trafficking to remain and work legally in Malaysia was adopted in 2014.

Moreover, the statistical data contained in this report indicates that: (i) from 2008 to 2014, 509 cases of trafficking for sexual exploitation and 291 cases of trafficking for forced labour were identified by the Royal Police; (ii) in 2014, two cases of trafficking were identified and investigated by special labour inspectors; (iii) in 2014, six integrated operations to rescue victims of trafficking were conducted jointly by the police, customs, maritime enforcement, immigration and labour officers; and (iv) 1,684 individuals who were rescued were granted interim protection orders and placed in a shelter.

The Committee also notes from the Report of the Special Rapporteur on trafficking in persons that:

- Malaysia faces challenges as a destination and, to a lesser extent, a transit and source country for men, women, girls and boys subjected to trafficking in persons. Fishermen, mainly from Cambodia and Myanmar are trafficked for bonded labour to work on Thai fishing boats in Malaysian waters as well as in palm oil plantations; a large number of women are trafficked into domestic servitude by employment agencies in their home country or in Malaysia or employers in Malaysia with the alleged complicity of State officials; a high number of women are trafficked into the sex industry; a significant number of refugees, asylum seekers and stateless persons, particularly from the Filipino and Indonesian communities in Sabah and Rohingya from Myanmar, are increasingly becoming victims of trafficking;
- the effective and swift investigation of offences under the Anti-Trafficking Act is hampered by a number of factors such as the limited coordination among enforcement agencies and the lack of skills to handle cases of trafficking as well as corruption of law enforcement officers; and
- the shelters run by the Ministry of Women, Family and Community Development which provides psychological, medical and other support services to victims of trafficking, are equivalent to detention centres where trafficked persons are treated as criminals in custody rather than victims.

***In light of the above information, the Committee requests the Government to strengthen its efforts to prevent, suppress and combat trafficking in persons, and to take the necessary measures to ensure that all persons who engage in trafficking and related offences are subject to investigation and prosecutions. In this regard, the Committee requests the Government to take measures to strengthen the capacities of the law enforcement bodies, to ensure that they are provided with appropriate training to improve identification of the victims of trafficking as well as measures to ensure greater coordination among these bodies. It requests the Government to provide information on the measures taken in this regard as well as information on the number of victims of trafficking who have been identified and who have benefited from adequate protection. It also requests the Government to provide information on prosecutions and convictions***

*pronounced. The Committee finally requests the Government to indicate the measures taken to implement the National Action Plan to Combat Trafficking in Persons, 2016–20, as well as the results achieved, both with regard to prevention and repression of trafficking in persons, and the protection and rehabilitation of victims of trafficking.*

*Following the request made by the Worker members and the Employer members at the Conference Committee, in June 2014, the Committee once again encourages the Government to consider availing technical assistance from the ILO in order to help it pursue its efforts to ensure the effective application of the Convention, so as to protect all workers, including migrant workers, from abusive practices that may amount to forced labour.*

The Committee is raising other matters in a request addressed directly to the Government.

#### **Direct Request (CEACR) - adopted 2016**

*Articles 1(1) and 2(1) of the Convention. Freedom of career military personnel to leave their service.* The Committee previously noted that, under regulation 51(1) of the Army and Air Force (Terms of Service) Regulations, 1961, the Armed Forces Council shall issue instructions setting out the conditions under which soldiers or airmen may be permitted to purchase their discharge. Pursuant to regulation 26 of this Regulation, career military officers are permitted to apply to resign their commission, except when: (i) a Proclamation of Emergency has been issued (pursuant to article 150 of the Federal Constitution or other written laws); or (ii) where the officer has undertaken to complete a specified period of full time service. In this regard, the Government stated that both career soldiers and airmen cannot claim discharge as a statutory right, but may nonetheless apply at any time to the Armed Forces Council to be discharged under the Regulations, 1961. All applications made by career officers are considered by the Armed Forces Council, who will then advise the Head of State, as cancellations of commissions are subject to the discretion of the Head of State (pursuant to section 9 of the Armed Forces Act 1972). Applications for discharge are considered on a case-by-case basis, taking into account the specific circumstance of each serviceman. Upon the approval of the application for the discharge by the Armed Forces Council, a serviceman would be permitted to purchase his discharge based on their years of engagement and rank. The Committee accordingly observed that, pursuant to regulations 26 and 51(1) of the Regulations, 1961, it appeared that the application for discharge by both career soldiers and career military officers may be rejected. It recalled that career military servicemen who have voluntarily entered into an engagement should have the right to leave the service in peacetime within a reasonable period, either at specified intervals, or with previous notice.

The Committee notes that the Government's report does not contain any information on this point. ***The Committee therefore once again requests the Government to take the necessary measures to ensure that career members of the armed forces enjoy the right to leave their service in peacetime at their own request, within a reasonable period, either at specified intervals, or with previous notice. The Committee requests the Government to provide information on the application in practice of regulations 26 and 51 of the Army and Air Force (Terms of Service) Regulations, 1961, particularly the numbers of applications to resign that have been accepted or refused and information on the grounds for refusal by the Armed Forces Council.***

#### **Observation (CEACR) - adopted 2014, published 104th ILC session (2015)**

**Follow-up to the discussion of the Committee on the Application of Standards (International Labour Conference, 103rd Session, May–June 2014)**

The Committee notes the detailed discussions that took place at the Conference Committee on the Application of Standards in June 2014 concerning the application of the Convention by Malaysia. The Committee notes with **regret** that the Government's report has not been received.

*Articles 1(1), 2(1) and 25 of the Convention. 1. Vulnerable situation of migrant workers with regard to the exaction of forced labour, including trafficking in persons.* The Committee previously noted the observations submitted by the International Trade Union Confederation (ITUC) in 2011, according to which some workers who willingly enter Malaysia in search of economic opportunities

subsequently encounter forced labour at the hands of employers or informal labour recruiters. These migrant workers are employed on plantations and construction sites, in textiles factories, and as domestic workers, and experience restrictions on movement, deceit and fraud in wages, passport confiscation and debt bondage. Domestic workers face difficult situations, including the non-payment of three to six months' wages. The ITUC contended that there had been no criminal prosecutions of employers or labour recruiters who subject workers to conditions of forced labour. The Committee also noted the information from the International Organization for Migration (IOM) that, as of 2009, there were approximately 2.1 million migrant workers in Malaysia, and that migrant workers in the country may be subject to unpaid wages, passport retention, heavy workloads and confinement or isolation.

The Committee noted that, in June 2013, the Conference Committee on the Application of Standards urged the Government to take immediate and effective measures to ensure that perpetrators of trafficking were prosecuted and that sufficiently effective and dissuasive sanctions were imposed, as well as to ensure that victims were not treated as offenders and were in a position to turn to the competent judicial authorities in order to obtain redress in cases of abuse and exploitation. The Conference Committee also encouraged the Government to continue to negotiate and implement bilateral agreements with countries of origin, so that migrant workers are protected from abusive practices and conditions that amount to the exaction of forced labour.

The Committee also noted that, in its observations submitted in August 2013, the ITUC stated that the situation and treatment of migrant workers in the country had further deteriorated, exposing more migrant workers to abuse and forced labour. The ITUC indicated that the Government had not taken any measures to monitor the deception of migrant workers through the use of false documentation or contract substitution upon arrival. Additionally, the ITUC pointed out that, despite protections in law, migrant workers often work long hours and are subject to underpayment or late payment of wages. An estimated 90 per cent of employers retain the passports of migrant workers, and these workers are often afraid to report abuse or even request information concerning labour rights. Migrant workers who leave their employer due to abuse become de facto undocumented workers, subject to deportation. The ITUC stated further that the Government had criminalized undocumented migrant workers, identifying 500,000 individuals for deportation without adequately investigating their statuses as potential victims of forced labour. The ITUC urged the Government to abolish the labour outsourcing system, and to include domestic workers within the scope of the Employment Act (Minimum Standards).

In this regard, the Committee noted the information provided by the Government in its 2013 report on certain measures taken in order to protect migrant workers, including through the establishment of a Special Enforcement Team, consisting of 43 officers, to enhance enforcement activities to combat forced labour issues. However, the Committee noted with concern that such measures had not yielded tangible results with regard to detecting or punishing forced labour practices. It urged the Government to take measures to protect migrant workers from abusive practices and conditions that amount to the exaction of forced labour, and to ensure that victims of such abuses are able to exercise their rights in order to halt violations and obtain redress.

The Committee notes that, during the discussions on the application of the Convention at the Conference Committee, in June 2014, the Government indicated that it was conducting awareness raising nationwide on the Minimum Wages Order of 2012 in order to prevent labour exploitation of migrants. Moreover, in order to regulate the recruitment of migrant workers, the Government indicated that it has signed memoranda of understanding (MOU) with eight countries of origin (Bangladesh, China, India, Indonesia, Pakistan, Sri Lanka, Thailand and Viet Nam), as well as a separate MOU on the recruitment and placement of domestic workers with the Government of Indonesia. The Government also indicated that cooperation agreements were under negotiation with another four countries. ***While taking due note of this information, the Committee strongly encourages the Government to continue to take measures to ensure that migrant workers, including migrant domestic workers, are fully protected from abusive practices and conditions that***

**amount to forced labour, and asks the Government to provide information in this regard. Recalling the central role of labour inspection in combating forced labour, the Committee requests the Government to provide information on the results achieved through the establishment of the Special Enforcement Team, as well as on any difficulties encountered by the Team and other law enforcement officials in identifying victims of forced labour, including trafficking in persons, and initiating legal proceedings. Finally, the Committee requests the Government to continue to provide information on the implementation of bilateral agreements with countries of origin, as well as any other cooperation measures undertaken in this regard, and the concrete results achieved.**

2. *Trafficking in persons.* The Committee previously noted the statement from the ITUC in its observations submitted in 2011 that Malaysia is a destination, and to a lesser extent, a source and transit country for trafficking of men, women and children, particularly for forced prostitution and forced labour. The ITUC also alleged that prosecution for forced labour trafficking was rare. The Committee also noted the launching of the National Action Plan on Trafficking in Persons (2010–15), as well as information from the Government on the number of prosecutions and convictions related to trafficking, but not on the specific penalties applied to perpetrators. In the context of the discussions which took place at the Conference Committee in June 2013, it noted the concern expressed by several speakers regarding the magnitude of trafficking in persons in the country, as well as the absence of information on the specific penalties imposed on persons convicted under the Anti-Trafficking in Persons Act. In this regard, the Conference Committee urged the Government to reinforce its efforts to combat trafficking in persons and to strengthen the capacity of the relevant public authorities in this respect.

The Committee notes that, during the discussions on the application of the Convention at the Conference Committee in June 2014, the Government reaffirmed its commitment to addressing trafficking in persons and provided information on various measures taken to this end, including measures to strengthen the capacity of law enforcement personnel and awareness-raising initiatives, as well as measures to better protect victims of trafficking. The Government indicated that a total of 128 cases were brought to court under the Anti-Trafficking in Persons Act in 2013, resulting in five convictions, six acquittals, three cases being discharged, and a total of 650 victims rescued. By the time of the Conference, 114 cases were still pending before the courts. Additionally, the Government indicated that the penalties of imprisonment imposed in these cases would act as a deterrent to prospective perpetrators of trafficking in persons.

The Committee further notes that, while the various steps taken by the Government were acknowledged by the members of the Conference Committee, delegates stressed that further measures were necessary in order to develop and implement effective action that is commensurate with the magnitude of the trafficking phenomenon. ***In light of the above considerations, the Committee strongly encourages the Government to pursue its efforts to prevent, suppress and combat trafficking in persons, and to take the necessary measures to ensure that all persons who engage in trafficking and related offences are subject to thorough investigations and prosecutions. The Committee requests the Government to continue to provide information on the number of convictions and the specific penalties applied. The Committee also requests the Government to provide information on the concrete results achieved through the implementation of the National Action Plan on Trafficking in Persons (2010–15), both with regard to prevention and repression of trafficking, and the protection and rehabilitation of victims.***

The Committee notes that both the Worker members and the Employer members at the Conference Committee, in June 2014, once again requested the Government to accept an ILO technical assistance mission to ensure the full and effective application of the Convention. ***In light of the above, the Committee hopes that the Government will give serious consideration to the possibility of availing itself of ILO technical assistance in the very near future in order to help it pursue its efforts to ensure the effective application of the Convention, so as to protect all workers, including migrant workers, from abusive practices that may amount to forced labour.***

The Committee is raising other matters in a request addressed directly to the Government.

**Observation (CEACR) - adopted 2013, published 103rd ILC session (2014)**

**Follow-up to the conclusions of the Committee on the Application of Standards (International Labour Conference, 102nd Session, June 2013)**

The Committee notes the communication from the International Trade Union Confederation (ITUC) dated 31 August 2013, as well as the Government's report. It also takes note of the detailed discussions that took place at the Conference Committee on the Application of Standards in June 2013 concerning the application by Malaysia of the Convention.

*Articles 1(1), 2(1) and 25 of the Convention. 1. Trafficking in persons.* The Committee previously noted the ITUC's statement that Malaysia is a destination, and to a lesser extent, a source and transit country for trafficking of men, women and children, particularly for forced prostitution and forced labour. The ITUC also alleged that prosecution for forced labour trafficking was rare. The Committee also noted the launching of the National Action Plan on Trafficking in Persons (2010–15), as well as information from the Government on the number of prosecutions and convictions related to trafficking, but not the specific penalties applied to perpetrators.

The Committee notes the Government's statement that it is taking measures to strengthen the capacity of the labour inspectorate to identify victims and deal with the complaints received, including capacity building courses in collaboration with the ILO and workshops with the Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants. The Government indicates that between 2012 and August 2013 there were a total of 120 cases brought under the Anti-Trafficking in Persons Act, resulting in 23 convictions. There were 30 cases discharged and 67 cases pending trial. The Committee once again notes an absence of information on the specific penalties applied to those convicted.

The Committee notes that the Conference Committee on the Application of Standards, in June 2013, took note of the concern expressed by several speakers regarding the magnitude of trafficking in persons in the country, as well as the absence of information provided on the specific penalties imposed on persons convicted under the Anti-Trafficking in Persons Act. ***The Committee, like the Conference Committee on the Application of Standards, urges the Government to reinforce its efforts to combat trafficking in persons and to strengthen the capacity of the relevant public authorities in this respect. It also requests the Government to continue to provide information on measures taken in this regard, including the implementation of the National Action Plan on Trafficking in Persons (2010–15), and on the results achieved. Lastly, it requests the Government to continue to supply information on the application in practice of the Anti-Trafficking in Persons Act, including the specific penalties applied to those convicted under the Act, starting with the 23 convictions reported by the Government between 2012 and August 2013.***

*2. Vulnerable situation of migrant workers with regard to the exaction of forced labour.* The Committee previously noted the ITUC's allegation that some workers who willingly enter Malaysia in search of economic opportunities subsequently encounter forced labour at the hands of employers or informal labour recruiters. These migrant workers are employed on plantations and construction sites, in textiles factories, and as domestic workers, and experience restrictions on movement, deceit and fraud in wages, passport confiscation and debt bondage. Domestic workers face difficult situations, including the non-payment of three to six months wages. There had been no criminal prosecutions of employers or labour recruiters who subject workers to conditions of forced labour. The Committee also noted the information from the International Organization for Migration, that as of 2009, there were approximately 2.1 million migrant workers in Malaysia, and that migrant workers in the country may be subject to unpaid wages, passport retention, heavy workloads and confinement or isolation. It further noted that a Memorandum of Understanding had been signed between the Governments of Indonesia and Malaysia.

The Committee notes the Conference Committee on the Application of Standards urged the Government to take immediate and effective measures to ensure that perpetrators were prosecuted

and that sufficiently effective and dissuasive sanctions were imposed, as well as to ensure that victims were not treated as offenders and were in a position to turn to the competent judicial authorities in order to obtain redress in cases of abuse and exploitation. The Conference Committee also encouraged the Government to continue to negotiate and implement bilateral agreements with countries of origin, so that migrant workers were protected from abusive practices and conditions that amounted to the exaction of forced labour once they were in the country, and to work with the countries of origin to take measures for their protection prior to departure.

The Committee notes that the ITUC, in its most recent comments, states that there has been no action taken by the Government since the Conference Committee's discussion and that the Government has not followed any of the recommendations made by that Committee. The ITUC asserts that the situation and treatment of migrants workers in the country has further deteriorated, causing more migrant workers to suffer from forced labour. The Government has not taken any measures to monitor the deception of migrant workers due to false documents or the switching of employment contracts upon arrival, although this is a well-known issue. Despite protections in law, most migrant workers work long hours and are subject to underpayment or late payment of wages. An estimated 90 per cent of employers retain the passports of migrant workers, and these workers are afraid to report abuse or even request information concerning labour rights. Migrant workers who leave their employer due to abuse become de facto undocumented workers, subject to deportation. The Government has further criminalised migrant workers, identifying 500,000 undocumented migrant workers for deportation without adequately assessing whether they are victims of forced labour. While the Ministry of Human Resources announced its intention in 2008 to introduce a regulation on the working conditions of domestic workers, this regulation has not yet been introduced. The ITUC urges the Government to abolish the labour outsourcing system, and to include domestic workers within the scope of the Employment Act (Minimum Standards).

The Committee notes the Government's indication that measures taken to protect migrant workers include the implementation of a programme that will result in the development of an updated list of foreign workers in the country, which will contribute to the protection of these workers against unscrupulous employers. This programme will create a platform for Malaysia to collaborate with sending countries to ensure the orderly entry of migrant workers, so that they can be protected from exploitation. The Government is also implementing an awareness-raising programme for foreign domestic workers and their employers, and has held seminars regarding the rules and regulations which are enforceable in Malaysia for 5,651 participants. Additionally, it has set up a Special Enforcement Team, consisting of 43 officers, to enhance enforcement activities to combat forced labour issues. The Department of Labour carried out 41,452 workplace inspections in 2012 and 15,370 inspections in the first nine months of 2013, to check for forced or compulsory labour practices, and no forced or compulsory labour practices were recorded. The Government further indicates that it has signed a Memorandum of Understanding with the Government of Bangladesh regarding the recruitment of workers.

While noting certain awareness-raising and data collection measures taken by the Government, the Committee observes that the implemented law enforcement measures appear to have yielded few tangible results. In particular, it notes with **concern** that the considerable number of inspections carried out appear not to have had a concrete impact with regard to combating forced labour practices in the country and ensuring that perpetrators of this practice are penalized. In this regard, the Committee recalls the importance of taking effective action to ensure that the system of the employment of migrant workers does not place the workers concerned in a situation of increased vulnerability, particularly where they are subjected to abusive employer practices, such as retention of passports, non-payment of wages, deprivation of liberty and physical and sexual abuse, as such practices might cause their employment to be transformed into situations that could amount to forced labour. **Therefore, the Committee once again urges the Government to take the necessary measures to ensure that migrant workers are fully protected from abusive practices and conditions that amount to the exaction of forced labour. In this regard, it urges the Government to**

*take specific measures to respond to cases of abuse of migrant workers and to ensure that victims of such abuse are able to exercise their rights in order to halt violations and obtain redress. It also requests the Government to take concrete action to identify victims of forced labour among migrant workers and to ensure that these victims are not treated as offenders. Moreover, noting an absence of information in the Government's report on any prosecutions undertaken, the Committee urges the Government to take immediate and effective measures to ensure that perpetrators are prosecuted and that sufficiently effective and dissuasive sanctions are imposed. It requests the Government to provide, in its next report, information on the number of prosecutions and convictions concerning the exploitative employment conditions of migrant workers, and the specific penalties applied. Lastly, the Committee requests the Government to continue to provide information on the implementation of bilateral agreements with countries of origin, as well as any other cooperation measures undertaken in this regard.*

The Committee notes that the Conference Committee, in June 2013, requested the Government to accept a technical assistance mission to ensure the full and effective application of the Convention. It also notes that the ITUC, in its most recent comments, urges the Government to accept an ILO mission to the country. In this regard, it notes the Government's statement in its report that it is still considering the offer, as forced labour in Malaysia is an issue which cuts across many government agencies. ***Taking note of the Government's statement, the Committee strongly encourages the Government to avail itself of ILO technical assistance, and to accept and receive a technical assistance mission in the near future.***

The Committee is raising other points in a request addressed directly to the Government.

#### **Direct Request (CEACR) - adopted 2013**

*Articles 1(1) and 2(1) of the Convention. Freedom of career military personnel to leave their service.* The Committee previously noted that, under regulation 51(1) of the Army and Air Force (Terms of Service) Regulations, 1961, the Armed Forces Council shall issue instructions setting out the conditions under which soldiers or airmen may be permitted to purchase their discharge. Pursuant to regulation 26 of this Regulation, career military officers are permitted to apply to resign their commission, except when: (i) a Proclamation of Emergency has been issued (pursuant to article 150 of the Federal Constitution or other written laws); or (ii) where the officer has undertaken to complete a specified period of full time service. In this regard, the Government stated that both career soldiers and airmen cannot claim discharge as a statutory right, but may nonetheless apply at any time to the Armed Forces Council to be discharged under regulation 51 of the Army and Air Force (Terms of Service) Regulations, 1961. All applications made by career officers are considered by the Armed Forces Council, who will then advise the Head of State, as cancellations of commissions are subject to the discretion of the Head of State (pursuant to section 9 of the Armed Forces Act 1972). Applications for discharge are considered on a case-by-case basis, taking into account the specific circumstance of each serviceman. Upon the approval of the application for the discharge by the Armed Forces Council, a serviceman would be permitted to purchase his discharge based on their years of engagement and rank. The Committee accordingly observed that, pursuant to regulations 26 and 51(1) of the Army and Air Force (Terms of Service) Regulations, 1961, it appeared that the application for discharge by both career soldiers and career military officers may be rejected. It recalled that career military servicemen who have voluntarily entered into an engagement should have the right to leave the service in peacetime within a reasonable period, either at specified intervals, or with previous notice. ***Noting an absence of information on this point in the Government's report, the Committee expresses the hope that measures will be taken to ensure that career members of the armed forces will enjoy fully the right to leave their service in peacetime at their own request, within a reasonable period, either at specified intervals, or with previous notice, in conformity with the Convention. The Committee requests the Government to provide available information on the application in practice of regulations 26 and 51 of the Army and Air Force (Terms of Service) Regulations, 1961, particularly the numbers of applications to***

*resign that have been accepted or refused and information on the grounds for refusal by the Armed Forces Council.*

## Committee on the Application of Standards of the International Labour Conference

### Individual Case (CAS) - Discussion: 2014, Publication: 103rd ILC session (2014)

The Government provided the following written information.

The Anti-Trafficking Act 2007 was amended in 2010. The Act came into force on 15 November 2010. It is now known as the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. The amendment was made so as to strengthen the regulatory framework to deal more effectively with the issues of human trafficking and smuggling of migrants in Malaysia. Interpretation of trafficking in persons and smuggling of migrants in accordance with the Act is as follows: "Trafficking in persons" is defined as all actions involved in acquiring or maintaining the labour or services of a person through coercion, for the purpose of exploitation. The profit in trafficking comes not from the movement of persons but from the sale of a trafficked person's services or labour in the country of destination. "Smuggling of migrants" means arranging, facilitating or organizing, directly or indirectly, a person's unlawful entry into or unlawful exit from any country of which the person is not a citizen or permanent resident. Virtually every country in the world is affected by this crime, whether as an origin, transit or destination country for smuggled migrants by profit-seeking criminals.

The amended Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 extends its coverage to the following: Section 15(a), to provide for a new offence. This amendment seeks to provide that a person who brings in transit a trafficked person through Malaysia by land, sea or air, or otherwise arranges or facilitates such act commits an offence. Section 17(a), to provide that the prosecution need not prove the movement or conveyance of the trafficked person to prove that the offence of trafficking in persons had occurred. The prosecution needs only to prove that the trafficked person was subject to exploitation. Part III(a). This new Part III(a) contains ten new sections, namely sections 26(a) to 26(j). The new Part III(a) addresses concerns that have arisen about the smuggling of migrants as a criminal activity distinct from legal or illegal activity on the part of the migrants themselves. The sections specifically criminalize the exploitation of migrants and the generation of illicit profits from the procurement of illegal entry or illegal residence of migrants. Section 41(a), to clarify that a smuggled migrant is only entitled to be protected under that Part if he was a trafficked person. Section 61(a), to provide for the admissibility of a deposition made by a trafficked person or a smuggled migrant who cannot be found during a proceeding in court. The deposition must have been made upon an oath before a session's court judge or a magistrate if in Malaysia or a consular officer or a judicial officer if outside Malaysia.

The Council for Anti-Trafficking in Persons (MAPO) was established under the Anti-Trafficking in Persons Act 2007. As far as the amended Act is concerned, MAPO is now known as the Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants. The Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants is headed by the Ministry of Home Affairs Secretary-General. Five taskforces were established to support the council's function. MAPO's objective is to make Malaysia internationally accredited as being free of illegal activities in connection with human trafficking and smuggling of migrants. Hence, MAPO's main function is to prevent and eradicate human trafficking and migrant smuggling crimes through comprehensive enforcement of the Act. MAPO's other roles are as follows: Formulate and oversee the implementation of a national action plan on the prevention and suppression of trafficking in persons including the support and protection of trafficked persons. Make recommendations to the minister on all aspects of prevention and suppression of trafficking in persons. Monitor the immigration and emigration patterns in Malaysia for evidence of trafficking and to secure the prompt response of the relevant government agencies or bodies, and non-governmental organizations to problems on trafficking in persons brought to their attention. Coordinate in the formulation of policies and monitor its

implementation on issues of trafficking in persons with relevant government agencies or bodies and non-governmental organizations. Formulate and coordinate measures to inform and educate the public, including potential trafficked persons, on the causes and consequences of trafficking in persons. Cooperate and coordinate with international bodies and other similar regional bodies or committees in relation to the problems and issues of trafficking in persons including support and protection of trafficked persons. Advise the government on the issues of trafficking in persons including developments at the international level against the act of trafficking in persons. Collect and collate the data and information, and authorize research, in relation to the prevention and suppression of trafficking in persons. Perform any other functions as directed by the minister for the proper implementation of the Act.

Apart from the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, Malaysia has a comprehensive framework of laws and regulations to protect labourers, irrespective of whether local or foreign. In addition, there are nine laws and regulations, specifically, to address the issue of forced labour as follows: Employment Act 1955 which provides minimum protection to employees with regard to their terms and conditions of service consisting of working hours, wages, holidays, retrenchment benefits, etc. Workers Minimum Housing Standards and Amenities Act 1990 (Act 446) which prescribes the minimum standards of housing, to require employers to provide medical and social amenities for workers. Workmen's Compensation Act 1952 (Act 273) which provides payment of compensation for injuries sustained in accidents during employment. Children and Young Persons (Employment) Act 1966 which provides regulations to protect children and young persons who are engaged in employment in terms of working hours, type of work, abuse, etc. Occupational Safety and Health 1994 which provides regulations to secure the safety, health and welfare of persons at work against risks to safety or health arising out of the activities of persons at work and providing industrial codes of practice to maintain or improve the standards of safety and health. Factories and Machinery Act 1967 (Act 139) which provides the control of factories with respect to matters relating to the safety, health and welfare of persons therein, the registration and inspection of machinery and for matters connected therewith. National Wages Consultative Council Act 2011 which aims to set up a council to recommend the minimum wage for various sectors, regions and jobs. Labour Ordinance (Sabah Cap. 67) which provides minimum protection to employees with regard to their terms and conditions of service consisting of working hours, wages, holidays, retrenchment benefits, etc. in Sabah. Labour Ordinance (Sarawak Cap. 76) which provides minimum protection to employees with regard to their terms and conditions of service consisting of working hours, wages, holidays, retrenchment benefits, etc. in Sarawak.

In addition, before the Committee, **a Government representative** outlined the various measures taken to monitor, prevent and suppress the problem of forced labour and human trafficking. The Government had ratified several international instruments and adopted several pieces of domestic legislation in this regard. These included the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act. This Act required the establishment of a Council for Anti-Trafficking Persons, which included Government representatives and civil society groups, and had been established in 2008. The Government had also adopted the National Action Plan on Trafficking in Persons (2010–15) which outlined the national efforts to combat trafficking in persons in the areas of prevention, rehabilitation, protection and prosecution. The Plan complemented the existing legislation and aimed to provide direction and focus to efforts in order to prevent and suppress trafficking in persons. With regard to cases of trafficking, there had been an increase in the number of cases brought to court. Out of the 128 cases brought in 2013, 114 were still pending before the courts. There had also been five convictions in such cases, and the penalties of imprisonment imposed in these cases would act as a deterrent to prospective perpetrators of this crime. In addition, 128 operations related to trafficking in persons had been conducted in 2013, resulting in 89 investigations, 140 arrests and 650 victims rescued. For the purpose of uniformity, Standard Operating Procedures had been launched in November 2013 for enforcement agencies to ensure a commitment to the process of identification, referral, assistance and social inclusion of presumed or

identified victims of trafficking in persons. In addition, 911 protection orders and interim protection orders had been granted. Based on complaints, as well as regular inspections, 1,663 investigations had been conducted at workplaces, while a total of 33,185 inspections had been conducted by the Department of Labour of Peninsular Malaysia. The Government was conducting awareness raising nationwide regarding the new Minimum Wages Order 2012, in order to deter labour exploitation of foreign workers. As of 2014, all employers were mandated to implement this Order, including for foreign workers. Additionally, initiatives to prevent forced labour and better protect victims of trafficking were being undertaken, including steps to: amend the Private Employment Agency Act, 1981; draft a Regulation for Domestic Workers; allow those victims of trafficking who did not require further protection and care to engage in work; and implement a pilot project for a shelter run by a non-governmental organization. In addition, the anti-trafficking legislation, supplemented by the Employment Act, 1955, and other pieces of labour legislation, addressed the issue of labour exploitation. Moreover, in order to regulate the recruitment of foreign workers, the Government had signed Memoranda of Understanding with eight source countries covering the formal sectors, as well as with the Government of Indonesia regarding the recruitment and placement of domestic workers. Moreover, the Government was currently negotiating with four other governments with the intention of concluding such agreements. The entirety of these measures indicated that the Government was committed to combatting trafficking in persons and smuggling of migrants in Malaysia.

**The Worker members** indicated that Malaysia was a destination country for trafficking in men, women and children for purposes of prostitution and forced labour. Despite the written information supplied by the Government on the amendments to the 2007 Anti-Trafficking in Persons Act and Anti-Smuggling of Migrants Act, it was a cause for some concern that the victims of trafficking were nowadays looked upon as irregular workers. More than half of the 120 court cases that had been brought for trafficking in 2012–13 had still not been settled, and no information was available on any sanctions imposed. The vulnerability of migrant workers to forced labour, notably in the textile, plantation and construction sectors, as well as in domestic work, was also worrying. With 2.2 million registered migrant workers and 1.3 million who were not registered, migrants made up a third of the country's workforce. Some 40 per cent of undocumented migrant workers were thought to be women. Upon their arrival in the country, migrant workers' passports were confiscated. Moreover, in many cases they were deceived concerning their wages and working conditions, were underpaid or had their pay withheld. From a legal standpoint, migrant workers were dependent on the placement agencies to which, since 2013, they had had to pay a commission that ought to be paid by their employer. In cases of physical or sexual abuse, they could not appeal to the courts for fear of having their contracts cancelled, whereupon they would become undocumented migrants and were liable to expulsion. Domestic workers were not protected under Malaysia's labour legislation, were not entitled to the minimum wage and could not join trade unions. No employer had ever been charged with violating the rights of domestic workers. Although there were sometimes bilateral agreements with the country of origin, neither these agreements nor Malaysia showed any concern for the situation of migrant workers. In conclusion, while laws on this issue did exist in Malaysia, they were not applied and no sanctions had ever been imposed.

**The Employer members** emphasized that the Committee's duty was of a technical nature, for it had to examine the application of a Convention on the grounds of its provisions. Hence, there was no room for political considerations on what should be the content of the Convention. Turning to the case, they observed that the Committee had to examine, for the second consecutive year, the application of the Convention by Malaysia, which was surprising since the Committee of Experts had not received new concerning facts. In that sense, for the Employer members, it was a real case of follow-up. On the grounds of the indications of the Government representative, there was some progress to be noted in what was indeed a difficult regional issue. The case concerned the problem of forced labour and trafficking of persons arising from labour migration. In this regard, they emphasized that, while the Convention imposed on States direct and serious responsibilities, the

problem of exaction of forced labour of migrant workers was more a regional issue than a national issue. While the Committee of Experts was limited to examining compliance at the national level when examining the application of a Convention by a specific member State, they considered that the Committee's discussion would be enriched if it was held on the basis of a collection of national responses of all countries concerned in South-East Asia. Due to the regional character of the issue, they welcomed the bilateral and multilateral agreements that had been concluded to tackle this issue. It was also encouraging to note that the Government indeed had undertaken a comprehensive process of labour inspection which showed that it assumed its responsibilities and was acting in good faith. This was even more noteworthy as the exaction of forced labour and the trafficking of migrant workers always occurred in the margins and shadows away from a standard process of labour inspection carried out to ensure the enforcement of law. In conclusion, and in spite of the fact that there was some progress, the Employer members stressed the need to reinforce the efforts to combat trafficking and the exaction of forced labour of migrant workers. To this end, the Government should avail itself of the technical assistance of the ILO.

**The Worker member of Malaysia** indicated that despite the serious issues raised during the Committee's session in 2013, there had been no initiatives taken for dialogue between the Government and the various stakeholders. There were 2.4 million authorized migrant workers in Malaysia as well as an additional 2.2 million undocumented workers. The Employment Act, 1955, had been amended to legalize the outsourcing of workers through third-party companies, which contributed to conditions amounting to forced labour. Migrant workers were at the mercy of the labour contractors and were deprived of security of tenure, social security benefits and occupational safety and health protection, and were unable to join unions. The amendments to the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act undermined efforts to combat human trafficking by narrowing the legal definition of human trafficking, and by increasing the likelihood that victims of trafficking would be treated as undocumented migrant workers subject to immediate deportation. However, the Government should be praised for establishing shelters for victims of trafficking. Nonetheless, the National Action Plan (2010–15) was only a general document, and contained few concrete steps. The Ministry of Human Resources did not have sufficient officers to address trafficking for labour exploitation, and these officers were not equipped to identify victims of trafficking. Migrant workers lacked access to justice, as those who filed cases against their employers had their work permits cancelled unilaterally, leaving them with irregular status. Irregular migrant workers were subject to arrest and punishment, and deportation procedures were often lengthy resulting in indefinite detention under poor conditions, which had resulted in the deaths of several workers. Moreover, domestic workers were not accorded the minimum standards contained in the national law. With reference to examples of abuse of domestic workers, it was underlined that there had been no consultations regarding the proposed regulations on domestic workers. Moreover, while the Minimum Wages Order, 2012, was welcomed, this Order did not apply to domestic workers, and further measures were necessary for its enforcement. The Government was urged to take steps to: welcome an ILO mission to Malaysia to meet the various stakeholders to jointly develop constructive proposals; accept ILO technical assistance without delay; establish national joint councils composed of tripartite partners and non-governmental organizations concerned with migrant workers' issues; establish regional joint councils; ensure that employers, recruiting agents and officers who contribute to trafficking in person were effectively punished; and ensure that the travel documents of migrant workers were not kept by unauthorized personnel including employers.

**The Employer member of Malaysia** strongly supported the statement of the Malaysian Government. The observations of the International Trade Union Confederation (ITUC) of August 2013 were not supported by any evidence concerning the alleged trafficking or forced labour of foreign workers. It was clear from the information provided, that the Government had taken and implemented the necessary initiatives to combat and eliminate any practice of human trafficking or forced labour, through various ministries and agencies, such as the Council for Anti-Trafficking in

Persons, which was tasked with the enforcement of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act, 2007. The Government had also established a comprehensive framework of laws and regulations to protect foreign workers, particularly those subject to forced labour. Furthermore, a Committee established at the Ministry of the Interior met every month to coordinate the anti-trafficking policy of the Government. In the federal state of Selangor, an anti-trafficking council had even envisaged independent anti-trafficking efforts. The Government had continued its public-awareness campaigns on anti-trafficking in the print media, on radio and television, including over 600 public-service-awareness programmes on trafficking in national and federal state radio stations. Training on anti-trafficking had continuously been provided to officers with responsibilities in this regard, including to Malaysian troops prior to their deployment in international peacekeeping missions. The information submitted by the Government had indicated that there had been 120 prosecutions under the Anti-Trafficking in Persons Act, 2007, resulting in 23 convictions with seven cases still pending. The Department of Labour had carried out 41,452 inspections in 2012 and 15,370 inspections in the first nine months of 2013 relating to forced or compulsory labour practices. It should be noted that no forced or compulsory labour practices were recorded in the first nine months of 2013. All the initiatives taken showed that the Government had taken the necessary and adequate measures within its capacity and means. They also showed the commitment of the Government and refuted any statements according to which it had failed to take any action since the last discussion of the case in the Conference Committee.

**The Government member of Singapore** welcomed the concrete efforts and measures taken by the Government to eliminate trafficking in persons, including: the adoption of relevant laws, such as the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act, 2007; a National Action Plan for 2010–15 focusing on prevention, rehabilitation, protection and prosecution; and the prosecution and conviction of a number of perpetrators by the national courts, including information on the specific penalties imposed in 2012 and 2013. The speaker also noted that additional initiatives were envisaged for the better protection of victims of trafficking, including allowing those who did not require protection and care, to work instead of being placed in shelter homes. Furthermore, he noted the pilot project for an NGO to run a shelter home providing assistance to victims, with support from the Government. The Government had been taking proactive and resolute steps to address the challenges in tackling and combating trafficking in persons. These efforts should be encouraged and further assistance provided to help the country to fulfil its obligations under the Convention.

**The Worker member of Indonesia** indicated that Malaysia remained the leading destination for the majority of Indonesia's migrant workers and that of the 1.2 million registered Indonesian workers in Malaysia, 70 per cent were female domestic workers. There were several reasons why trafficking originated from Indonesia. Firstly, many undocumented workers, which were at a higher risk of becoming trafficking victims, could easily pass into Malaysia through sea or land borders. Secondly, workers became victims of organized crime syndicates that recruited a significant number of young women by promising work in restaurants and hotels, or by the use of "Guest Relations Officer" visas and false documents, but were subsequently coerced into Malaysia's commercial sex trade. Reports alleged that collusion between individual police officers and trafficking offenders led to the worsening of these practices. Others became trafficking victims through accumulated debts with labour recruiters, both licensed and unlicensed companies, which used debt bondage to hold documents and threats of violence to keep migrants in forced labour. These were the reasons why the Indonesian Government stopped sending migrant workers to Malaysia between June 2009 and December 2011, and only reauthorized it after an amended Memorandum of Understanding was signed by both countries, guaranteeing that Indonesian workers would enjoy basic rights such as minimum wages and keeping their own passport, and agreeing to improve the practice of recruitment agencies regarding placement fees, dispute settlement and tightening the process of issuing visas. Great hope initially rested on this Memorandum of Understanding, but it had not been fully implemented and it was important that non-state actors, namely unions, be involved in the

monitoring of its implementation. The Malaysian Trade Union Congress had been willing to support and recruit migrant workers as part of their union, but the immigration law prohibited migrant workers from joining trade union activities. Domestic workers were also being categorized as informal workers, leaving them without adequate protection when they needed help. National laws and the Memorandum of Understanding could be more effective if trade unions were able to represent the interests of migrant workers. There was no clear policy acknowledging migrant workers as having the right to enjoy the same legal protection as national workers. Malaysia and Indonesia needed to quickly ratify the Domestic Workers Convention, 2011 (No. 189), so that all domestic workers could be recognized by the law and spared from abuse. Since the Government publicly acknowledged the human trafficking problem, he called upon the Government to show a greater commitment to addressing the issue, including through increased investigations and prosecutions of offences and identification of victims, increased efforts to prosecute trafficking-related corruption by government officials, and greater collaboration with NGOs and international organizations to improve victim services in government shelters.

**The Government member of Brunei Darussalam** stated his Government's support for the response of the Government to the observations made by the Conference Committee regarding its compliance with the Convention. He recalled that Brunei Darussalam and Malaysia had shared special relations and cooperation for decades. His Government acknowledged and appreciated the concerns raised by the Conference Committee, but also wished to highlight the positive initiatives and efforts that had been conducted and strategically implemented, namely: the establishment of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act, 2007; the efforts toward the strengthening of legal mechanisms dealing with trafficking in persons; and the improvement of the protection and rehabilitation of victims, with resources allocated to combating trafficking in labour through systematic inspections and investigations.

**The Worker member of the Philippines** expressed the view that the situation of migrant workers had not improved since the discussion in the Conference Committee in 2013, and required more appropriate and bold actions and initiatives. He indicated that Malaysia was a country of destination and, to a lesser extent, a source and transit country for trafficking in persons. The majority of trafficking victims voluntarily immigrated to Malaysia in search of a better life, and while many offenders were individual business people, large organized crime syndicates with connections to high government officials were also involved. Many young women were recruited for work in Malaysian restaurants or hotels, some of whom migrated through the use of "Guest Relations Officer" visas, but were subsequently coerced into Malaysia's commercial sex trade. There were about 2 million documented workers, and about the same amount of undocumented workers in the country. Many migrant workers faced restrictions on movement, deceit and fraud in wages, passport confiscation or debt bondage. While the Government had passed the 2007 Anti-Trafficking and Anti-Smuggling of Migrants Act, victims were more likely to be treated as undocumented migrants than as victims, and were therefore subject to immediate deportation. Only a few prosecutions or arrests for forced labour had been reported. On the contrary, the speaker referred to a case where an Indonesian girl identified as a victim of trafficking by the authorities had been prosecuted for theft, with her employer being left unpunished. The country should therefore intensify its efforts to identify victims of trafficking and investigate and prosecute the crime. It should also increase its efforts to prosecute corruption by government officials in relation to trafficking and enhance collaboration with trade unions, NGOs and international organizations to assist victims in government shelters. Bilateral agreements with neighbouring countries should also be encouraged and closely monitored to ensure effective enforcement.

**The Government member of Myanmar** welcomed the various efforts and measures of the Government with regard to the elimination of trafficking in persons, not only at the national, but also at the regional and international levels. These measures had included the adoption of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act, 2007, and the establishment of the National Action Plan (2010–15). It was positive to learn that the initiatives were also in accordance

with regional and international instruments, such as the ASEAN Declaration Against Trafficking in Persons Particularly Women and Children, the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child. The additional initiatives to provide better protection for victims of trafficking in persons were also welcomed. Furthermore, the memoranda of understanding with at least 13 countries on the recruitment and placement of domestic workers and the current negotiations with other countries to this effect, including Myanmar, were also positive developments.

**The Worker member of France** noted that workers' rights in Malaysia were gradually being diminished by a Government which afforded more importance to the welfare of enterprises than the welfare of workers. The increasingly common practice of using recruitment agencies was an illustration of that. In fact, migrant workers had no direct contact with their employers as the agency served as their employer. In addition, those agencies profited from migrants' work by levying almost half of the wages earned, including for overtime and work on weekends and public holidays. Moreover, until 2013, employers using those recruitment agencies had to pay a placement fee. A government decision of 30 January 2013, however, currently authorized employers to recover the sum paid to the agencies by deducting it from workers' wages. The Government indicated that the measure was intended to reduce labour costs. The fee should simply have been scrapped since it in fact fell on the workers by drawing them into a spiral of debt and vulnerability. In order to break a contract, employers only had to inform the recruitment agency that they no longer needed the worker, and to communicate with the ministry responsible for immigration so that the migrant would be returned to the country of origin. Many employers preferred to utilize that workforce rather than a local workforce so as to avoid employment relations. The recruitment agencies thus became "labour service providers". However, under Malaysian legislation, those practices were illegal. The employment of workers through recruitment agencies was authorized, however such agencies were not supposed to take the place of employers. The Government had recalled in 2010, that outsourcing companies were responsible only for organizing the entry of workers into the country and that the employers were bound to ensure that all the rights of workers were recognized and respected, and to meet all their legal obligations. Employers therefore could not escape employment relations with their workers by claiming that the responsibility fell on the recruitment agency. Furthermore, employers had additional obligations to those workers, beyond the workplace and working time, since they should usually provide accommodation and ensure social security coverage. The law should prevent employers from disregarding existing regulations and engaging migrant workers in conditions of forced labour, as such a situation was unacceptable.

**The Government member of Switzerland** expressed concern about the allegations of trafficking in persons and the absence of adequate court proceedings in that area. Additionally, the Committee of Experts had reported a deterioration of the situation and treatment of migrant workers, as it appeared they were criminalized rather than protected from abuse. The Swiss Government commended the Government's efforts to address those issues, but invited it to intensify them. To that end, the Government should formulate regulations on domestic workers and legislation on migrant workers in general, as recommended to it by other United Nations bodies.

**The Government member of the Russian Federation** considered that the current debate was the last stage in the examination of the case. Malaysian legislation was in conformity with the Convention and provided for heavy sanctions in cases of trafficking in persons. Additionally, the Government had concluded bilateral agreements and agreements with the countries of origin of migrant workers, which were of particular importance. It was taking subsequent action in the framework of the legislation and bilateral agreements. He concluded by inviting the Government to strengthen its efforts, and in particular to protect the rights of migrant workers. The Government should provide information to the ILO, which in turn should continue to provide technical assistance to the Government.

**The Government representative** expressed his Government's respect and heartfelt appreciation for the many views and complimentary comments submitted by the tripartite members

with regard to the pertinent issues raised in relation to the application of the Convention. Having regard to the policy of securing a well-balanced growth between social and economic development and the demand for social equity, preservation of dignity, respect, and care for the well-being of people, he reiterated that the Government had undertaken to regularize and heighten its collaborative engagement with the domestic tripartite constituents, in addition to regulating and promulgating policies to solicit and bind common cooperation with governments and the international community so as to minimize, if not eliminate, the possibility of human trafficking across boundaries. The launch by the Government of the National Action Plan against Trafficking in Persons (2010–15), on 30 March 2010, reflected its commitment and aspiration to combating the crime of trafficking in persons. The plan outlined several guiding principles, strategic goals and programmes undertaken by the Government which guided the nation in its mission to deal with this heinous crime. The Government's firm and persistent policy was to secure the continued and constructive execution of principles that had been identified as fundamental in guiding and ensuring the smooth implementation of the Government's National Action Plan. It was also pertinent to establish close cooperation and coordination, as well as implementing integrated actions, with respect to information sharing, entry point control, delimitation, prevention, investigation and prosecution, among enforcement agencies, relevant ministries and agencies, including state governments and local authorities, so as to ensure that victims were given timely protection and that perpetrators were punished. The Government strongly believed in the importance of tripartite engagement for overcoming irregular practices with regard to human trafficking. The speaker urged the employers and workers to work hand in hand with the Government in order to achieve this common goal. Such commitment would certainly take into consideration the very subject matter addressed in the Conference Committee's discussion in this regard. He reiterated that the Government, through the Council of Anti-Trafficking in Persons and Anti-Smuggling of Migrants, had had regular engagement with several relevant government ministries and departments over the years, with a view to innovating new ways of tackling and managing issues associated with trafficking in persons and smuggling of migrants, this amidst challenges in the labour market. The Government needed collaborative networking and the unwavering support by all concerned in order to ensure the smooth implementation of its policy. The complex and challenging issues relating to trafficking in persons and the mobilization of persons across regions needed to be regulated effectively.

**The Worker members** recalled that in 2013, the Conference Committee had requested the Government to take immediate and effective steps, but that it had not done so and had followed none of the Committee's recommendations. According to the Malaysian trade unions, there had been no social dialogue either, with the Government merely organizing public-awareness workshops and training a special team of 43 officials. In spite of the large number of workplace inspection visits that had been carried out (more than 15,000 in the first nine months of 2013), the labour inspectorate had failed to uncover a single instance of forced labour. In the document the Government had submitted to the Office, it cited nine laws and regulations that dealt with forced labour, but the Worker members wondered what purpose such a juridical arsenal of provisions could serve if the number of migrant workers engaged in forced labour in Malaysia continued to rise. The Government should adopt effective measures that afforded migrant workers full protection and allowed them to exercise their rights, especially their right to compensation in cases of abuse. Victims of forced labour should no longer be treated as delinquents. As to domestic workers, the Government should enforce the Minimum Standards Act and ratify Convention No. 189. More than anything, the Government should ensure compliance with all legislation that prohibited the confiscation of passports, provided for compulsory insurance against occupational accidents and banned placement recruitment agencies from acting as employers. Purveyors of forced labour should be taken to court and sentenced to fines that were genuinely dissuasive. The Worker members called on the Government to: establish a national migration board composed of representatives of all the parties concerned, including the social partners and NGOs in order to monitor migration policy; set up regional boards to work with the source countries of migrant

workers and with social workers and NGOs in order to monitor the compliance of bilateral agreements with Convention No. 29 and other fundamental Conventions; and to accept a direct contacts mission to assess the entire situation.

**The Employer members** stated that the discussion had overlapped with issues of labour migration and practices of recruitment agencies, and asserted that the Conference Committee should only supervise issues within the scope of the Convention. They indicated that while differences had emerged during the discussion, there was also a strong determination that this Convention should be robustly supervised for all countries, including Malaysia, and that forced labour needed to be eradicated. The difference was that while the Worker members considered that no substantial progress had been achieved, the Employer members saw this as a case of progress, considering that the Government had presented a series of steps which provided a solid response to the Conference Committee's June 2013 discussion. In addition, they were encouraged by the Government's acknowledgment of the issue in this case and of the fact that its journey was incomplete and that it required the support of external actors. They encouraged the Government to use the capacities of the ILO and those existing within the country, and pointed out that multiple tools were available to help it resolve its forced labour issues. They finished by stating that further progress could be made, but that strong national determination was necessary in order to achieve this.

### **Individual Case (CAS) - Discussion: 2013, Publication: 102nd ILC session (2013)**

**The Government** provided the following written information.

The National Action Plan against trafficking in persons and smuggling of migrants (2010–15) had been introduced. There were eight core areas covered by the Action Plan and these were as follows: (i) establishment of the Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants (the Council); (ii) strengthening of the existing law relating to anti-trafficking in persons and anti-smuggling of migrants; (iii) establishment of shelter homes; (iv) collaboration with civil society groups; (v) capacity building for enforcement agencies; (vi) documenting standard operating procedures in relation to anti-trafficking in persons and anti-smuggling of migrants; (vii) international/bilateral cooperation; and (viii) raising awareness.

The Council which was established in 2008 and headed by the Secretary-General of the Ministry of Home Affairs, had the objective of formulating and overseeing the implementation of the National Action Plan on the prevention and suppression of trafficking in persons including the support and protection of trafficked persons.

In 2010, the original Anti-Trafficking in Persons Act, 2007 (Act 670) was amended to include the following: (i) trafficking in persons which was defined as all action involved in acquiring or maintaining the labour or services of a person through coercion, for the purpose of exploitation. The profit in trafficking came not from the movement of person but from the sale of a trafficked person's services or labour in the country of destination; and (ii) smuggling of migrants which meant arranging, facilitating or organizing, directly or indirectly, a person's unlawful entry into or unlawful exit from any country of which the person was not a citizen or a permanent resident. There were presently six gazetted shelter homes for victims of labour trafficking. Each shelter could accommodate 200 persons at any one time and had been in operation since 15 August 2010. In addition to government-operated shelters, the Government also actively cooperated with civil society groups for the establishment of additional shelters and the provision of counselling and skills training for the trafficked victims. Capacity building was also an essential component of efforts to heighten the investigative and intelligence gathering of enforcement agencies. Towards this end, front line agencies such as the Immigration Department, the Royal Malaysia Police, the Malaysian Maritime Enforcement Agency, the Royal Malaysian Customs and the Department of Labour were actively pursuing training courses either locally or in cooperation with other countries such as Australia and Brazil.

Peace, prosperity and rapid development of the country had attracted foreigners, the majority of whom were looking for job opportunities, especially those from countries which were

experiencing political and economic instability. At the same time, the country needed foreign workers in certain sectors such as services, plantation, industrial, construction and manufacturing. The existence of anti-trafficking law supplemented by the Employment Act, 1955 and other labour legislation addressed the issue of labour exploitation. In order to regulate the recruitment of the foreign workforce, the Government had signed Memoranda of Understanding (MOU) with at least 13 countries of origin including a specific MOU on the recruitment and placement of domestic workers. All the MOUs were aimed at benefiting equally both employers and employees. A case in point was the MOU on the recruitment of Indonesian foreign workers which was signed in 2003 and subsequently there were a series of negotiations to further strengthen the greater bilateral cooperation between the Governments of Malaysia and Indonesia. The Government would not tolerate transgression of the Anti-Trafficking in Persons Act. As of April 2013, 442 such cases were taken to court and 174 cases were pending trial under the Anti-Trafficking in Persons Act, 2007. The implementation of this law would continue to be the core commitment of the Government in handling of issues concerning forced labour.

In addition, before the Committee a **Government representative**, referring to and supplementing the written information provided, emphasized that his Government had taken various steps in its constant endeavour to monitor, prevent and suppress the problem of trafficking in persons, including the ratification of the United Nations Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the "Trafficking Protocol"). In addition, 30 state specialist prosecutors had been appointed and guidelines had been issued on the handling of cases of trafficking in persons. Various measures had also been taken to avoid misidentification between the crimes of trafficking in persons and the smuggling of migrants. Capacity building was essential in ensuring that the personnel of all the agencies and non-governmental organizations involved in efforts to combat trafficking in persons had the relevant knowledge and skills, particularly in the areas of policy, prevention, protection, rehabilitation and prosecution. In that respect, it was of great importance to share knowledge and experience with foreign partners. Standard operating procedures had also been developed for the committees of the Council for Anti-Trafficking and Anti-Smuggling of Migrants and a national referral system was being developed to screen all cases and reports of trafficking in persons and smuggling of migrants. Government action in the field of capacity building included the seminar conducted in 2011 by the Attorney-General's Chambers for participants from non-governmental organizations, private agencies, universities and public agencies on the rights of employees and the roles and responsibilities of employers.

He emphasized that trafficking in persons was a complex crime that commonly involved crime syndicates operating in organized, structured and well-established networks. A comprehensive and coordinated response was therefore essential, backed up by cooperation and collaboration at the national, regional and international levels. As the problem of trafficking in persons was relatively new in the country, it had been necessary to focus on the constant and widespread dissemination of information, as well as investing in capacity building and obtaining the support of community leaders to shape public opinion. Efforts were being made to establish close cooperation and coordination between enforcement agencies, the relevant ministries and agencies, including state governments and local authorities, with regard to information sharing, entry point control, prevention, investigation and prosecution with a view to ensuring the timely protection of victims and the punishment of perpetrators. The Government was also placing emphasis on a systematic and effective information management system to improve inter-agency coordination and raise public awareness through the dissemination of the relevant information.

**The Employer members** emphasized their wholehearted support for the Convention and their commitment to the elimination of forced labour, including trafficking in persons for the purpose of forced labour. They also supported the initiative to set new standards to supplement the Convention. They recalled that Malaysia was primarily a country of destination of migrant labour and, in the same way as other countries of destination, there appeared to be a number of issues in

the country in relation to migrant labour. There were reports of migrant workers being subjected to such practices as having their passports retained by their employers, wages remaining unpaid and being deprived of their liberty, which constituted problems in relation to the application of the Convention and the law in general. Two Governments, Indonesia and Cambodia, had suspended the sending of their citizens to work in Malaysia, although the Government of Indonesia had recently lifted the suspension following the conclusion of an agreement with the Government of Malaysia that Indonesian migrant workers could retain their passports, earn market wages and benefit from one day of rest each week. The Employer members noted that there appeared to be some progress on the issue, particularly in relation to the agreement with the Government of Indonesia. They also noted the adoption of the Anti-Trafficking in Persons Act, 2007, which established penal sanctions for individuals convicted of trafficking for forced labour. It appeared that the Government was actively prosecuting violations of the Act and obtaining convictions. The Employer members hoped that the convictions were accompanied by adequate punishment and would like to see statistical data on that issue. The numerous other measures mentioned by the Government representative were also of interest.

**The Worker members** recalled that forced labour was prohibited by the Constitution and legislation. The Anti-Trafficking in Persons Act had been adopted in 2007 to combat a phenomenon that had been described as early as 2001 as a scourge that was growing with technological progress in transport and organized crime. Malaysia was a country of destination and, to a lesser extent, a country of origin and transit for trafficked men, women and children, especially for prostitution and forced labour. Although the new legislation provided for severe sanctions, there was no avoiding the fact that the Government had failed to supply any information on the sanctions imposed. An Interpol report referred specifically to the forced prostitution of Ugandan women in Malaysia, some of whom had been diverted while travelling to China or Thailand and had been forced to engage in prostitution. There were no precise figures. However, the vast majority of the victims of human trafficking were part of the 2 million workers in a regular situation and roughly 1.9 million workers in an irregular situation, essentially from Indonesia, Nepal, India, Thailand, China, the Philippines, Burma, Cambodia, Bangladesh, Pakistan and Viet Nam. Children were often exploited as cheap labour or for sex exploitation, forced marriage, criminal activities, armed conflict or begging. United Nations Children's Fund (UNICEF) had highlighted the fact that the trafficking of children was considered normal in the country. Cheating migrants out of their wages, confiscating their passports, placing them in debt bondage and housing them in warehouses were common practice. The trafficking in person for the purpose of forced labour was one of the most lucrative businesses in the world. Yet the Government had cited only 844 victims of trafficking who were under court protection, pursuant to section 51 of the 2007 Act, and 2,289 others who had been granted temporary protection for 14 days under section 44 of the Act. Either the Government was not in possession of accurate statistics, or its presentation of the facts was over-optimistic. In any event, a veritable gulf existed between the information that it had provided and the data supplied by non-governmental organizations and international institutions.

Recalling that the Convention required the illegal exaction of forced or compulsory labour to be punished by penalties that were truly effective and strictly enforced, the Worker members regretted that the Government's report contained no information on the penalties imposed in practice. That showed that the Government was not doing enough to combat the problem and was not really trying to eradicate forced labour, which had traumatic moral and physical effects on those concerned, many of whom subsequently experienced great difficulties in reintegrating into society. And yet, as a signatory since 2009 to the Trafficking Protocol, the Government should be aware of the provisions of article 6 on that subject. The Worker members considered that it appeared obvious that the Government was respecting neither the letter nor the spirit of the Convention and that greater efforts were needed to implement the observations of the Committee of Experts. The case under discussion was particularly serious, and probably only represented the tip of the iceberg.

**The Worker member of Malaysia** emphasized that the estimated 2.2 million migrant workers in a regular situation in Malaysia, as well as the estimated 2 million workers in an irregular situation, were engaged, not only in plantations, which used to be their main employer, but also in manufacturing, services and domestic work. The migrants were from neighbouring countries and were brought in by recruitment agencies. However, there was no proper monitoring mechanism for migrant workers, there had never been a comprehensive policy for foreign labour and the Government had no knowledge of the exact numbers of workers concerned. While in most cases there were no agreements between the Government and the Governments of countries of origin, in 2011 an agreement had been signed with the Government of Indonesia under which Indonesian domestic workers had the right to retain their passports, earn market wages and benefit from one rest day a week. Although the Government seemed to consider the agreement with Indonesia as the answer to the problems experienced by migrant workers, the reality was quite different. There continued to be a complete failure to speak honestly and openly about the institutionalized nature of the abuse that they suffered, while discussions between the governments concerned tended to focus on maximizing profits, minimizing costs and keeping market rates competitive. And yet, Indonesian migrant domestic workers suffered from various forms of violence. Over half of them suffered physical abuse, 15 per cent were sexually abused and their poor working conditions included no weekly paid rest day, the non-payment and wrongful deduction of wages, improper accommodation, long working hours, multiple jobs and undernourishment. Investigations by non-governmental organizations showed that almost half of migrant domestic workers were below the age of 21, which was the minimum legal age for domestic work in Malaysia. Recruitment agencies subjected migrant domestic workers to harsh treatment, including the retention of their passports, searches and confiscation of the contact details of their embassies and of non-governmental organizations which could protect them. The agreement concluded with the Government of Indonesia might have been more effective if there was a proper mechanism to monitor its implementation.

Migrant workers from Bangladesh also suffered from severe abuse. Following the lifting of the ten-year freeze on their recruitment by the Government of Malaysia in 2006, thousands of Bangladeshi workers had been recruited and cheated by approved outsourcing companies, which retained their passports and failed to renew their work permits, leaving them in an irregular situation. Under a programme launched in 2011, the Government had approved 340 agents to register and legalize the migrant workers, including issuing them with new passports and work permits. However, many of the agents were, in practice, the same outsourcing companies which had subjected them to abuse. A year and a half since the launch of the programme, and six months after the final deadline for the completion of the legalization process, thousands of workers were still in an irregular situation. They had not only lost one year's wages, but had no passports and lived in fear of arrest, detention and maltreatment, and were often threatened by their agents. Although complaints had been filed, none of the agents had been arrested. An example was an agent which, according to reports from the workers concerned, had registered over 5,000 workers, collected money from them, retained their passports and continued to threaten them. No action had been taken despite the numerous complaints made to the Bangladesh authorities. The authorities of Malaysia and Bangladesh should therefore be called upon to investigate the situation immediately and to retrieve and return the workers' passports. He called on the Government to draw up a clear roadmap to ensure the rights of all domestic and migrant workers in the country, improve screening to identify victims of abuse and trafficking, and provide victims with legal aid, counselling and other forms of assistance. The Government needed to have the political will to impose severe penalties under the Anti-Trafficking in Persons Act as a deterrent to abuse by traffickers, agents and employers. The discussion of the case by the Committee was particularly welcome and offered hope to the workers concerned.

**The Employer member of Malaysia**, stating that forced labour could not be condoned, fully supported the initiatives and positive actions of the Government in combating and eliminating

forced labour, especially trafficking in persons. The root cause of foreign workers having huge debts even before leaving their country needed to be addressed urgently. He therefore urged the ILO and the other relevant United Nations agencies to work closely with the countries of origin to address the situation of informal recruiters imposing high fees on foreign workers. Governments of the countries of origin should ensure that exorbitant fees were not imposed on their nationals seeking employment abroad as these workers were already contributing tremendously to their country through the remittances they sent home. His organization had been calling for clearer and consistent policies on the recruitment of foreign workers with a view to reducing the role of informal recruiters. In this regard, he referred to two initiatives carried out under the ILO TRIANGLE Project in which the Malaysian Employers Federation was involved, notably: the study for the ASEAN (Association of Southeast Asian Nations) Confederation of Employers (ACE) to develop a compendium of best practices to be used by countries of origin and destination in managing the pre-departure, the employment and post-employment of foreign workers; and the forthcoming "Guidelines for Malaysian Employers on Managing the Employment of Foreign Workers". He wished that similar collaborations with the ILO Regional Office in Bangkok could be replicated in other countries in the region. He expressed the sincere hope that with the positive initiatives in place, the forced labour issues, especially those pertaining to the employment of foreign workers, would be better managed and eventually eliminated.

**The Worker member of Indonesia** highlighted that Malaysia was one of the largest countries of destination for migrant workers in South-East Asia, and that there were approximately 2 million migrant workers from Indonesia. Due to loans at exorbitant interest rates, most migrant workers could not afford to return to their home countries, and some were in bonded labour. A large number of migrants were working in hazardous situations, including long working hours, and faced physical and sexual abuse. Turning to the specific situation of women domestic workers and their vulnerability to abuse, including harassment and rape, she recalled that the Government of Indonesia had imposed a ban imposed on sending Indonesian domestic workers to Malaysia. The ban had been lifted after the signing in 2011 by the Governments of Malaysia and Indonesia of a Memorandum of Understanding (MOU) on provisions on minimum wages, rest days, and the right of domestic workers to retain their identity documents. However, in practice employers or private recruiters were still retaining passports of domestic workers and the MOU was not being properly implemented. In addition, the MOU allowed for overtime payment instead of providing the one day of rest, without a proper mechanism to monitor such overtime payments. The lack of effective enforcement of the MOU could result in encouraging slavery-like practices and she considered that the Government had yet to demonstrate its strong commitment to protect domestic workers against forced labour.

**The Worker member of Cambodia** drew attention to the exposure to forced labour of women and girls migrating to Malaysia as domestic workers. The lack of employment opportunities led many women to migrate, and out of the 20,909 workers migrating in 2010, 18,038 were domestic workers. He pointed to situations of forced labour at the hands of employers or informal labour recruiters operating in Malaysia, as well as Cambodia, through illegal salary deductions, non-payment of wages, and passport confiscation. Legal protection to address excessive working hours, psychological, physical and sexual abuse against domestic workers was also insufficient as the Employment Act excluded domestic workers from key labour protections. Workers who wished to leave an abusive employer without permission lost their legal status and often faced penalties under immigration law. This increased their reluctance to leave an abusive employer exposing them to forced labour practices. While noting the Cambodian Government's announcement to freeze the sending of migrant workers to Malaysia as a response to the abovementioned violations, he hoped that the Government of Malaysia would also stop tolerating forced labour practices against migrant domestic workers.

**The Worker member of the Philippines** highlighted that Malaysia had become a country of origin and destination, as well as a transit country for trafficking in persons, especially of women and

children. The majority of the victims of trafficking were migrant workers from Indonesia, Nepal, India, Thailand, China, the Philippines, Burma, Cambodia, Bangladesh, Pakistan and Viet Nam. In 2009, there were approximately 2 million migrant workers in a regular situation and an almost equal number in an irregular situation in the country. Migrant workers in plantations, construction sites, textile factories and domestic service experienced restrictions on movement, fraud in wages, passport confiscation or debt bondage. A significant number of young women were recruited for work in restaurants and hotels and subsequently coerced to work in the sex industry; many subcontracting companies recruited workers who were then submitted to conditions of forced labour. He drew attention to the very low number of prosecutions under the Anti-Trafficking in Persons Act and the lack of information on specific sanctions applied to those convicted, as well as the deportation of some victims of trafficking who had been given protective orders at an initial stage. The speaker urged the Government to intensify its efforts to: (i) investigate and prosecute labour trafficking offences; (ii) identify labour trafficking victims; (iii) prosecute cases of trafficking-related corruption by government officials; and (iv) enhance collaboration with trade unions, non-governmental organizations and international organizations to improve services for victims in public shelters.

**The Government representative** reaffirmed his Government's firm commitment to regularize and increase its collaboration with the social partners in the country, and cooperate with other governments and the international community with a view to minimizing, if not eliminating, trafficking in persons across borders. As shown in the National Action Plan on trafficking in persons and smuggling of migrants (2010–15), the Government set out policies to minimize the possibility of trafficking in persons, through collaboration and constructive dialogue with the social partners and civil society. Regional cooperation with the Asian countries to regulate cross-border migration of workers, especially those without proper documentation, was also important in the context of efforts to combat trafficking in persons. Through the Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants, the Government had innovated appropriate and workable mechanisms and approaches in tackling and managing the issue over the past three years. While the concerns raised before the Committee were shared by the Government, the responsibility to address the issue of trafficking in persons should not be put on the Government alone. Rather, collective efforts were needed, involving all parties concerned, including the social partners. Due to the importance of enforcement, the enforcement agencies would provide full cooperation to the parties concerned to address and resolve this issue in an expeditious manner.

**The Employer members** stated that it was the first time that this case was being discussed in the Committee and, unlike the Worker members, they did not consider the observation of the Committee of Experts merely describing the "tip of the iceberg". The Government did not deny that there were forced labour issues in the country and had provided information on the constructive measures it had taken to address them. The Employer members encouraged the Government to work with the social partners and with other countries in the region, in particular countries of origin, to address the issue of forced labour. In this regard, more emphasis could be placed on memoranda of understanding such as the one with the Government of Indonesia with a view to ensuring protection of the rights of workers from these countries, concerning hours of rest, leave, as well as wages, and that workers could keep their passports. They asked the Government to submit in 2014 a report to the Committee of Experts on the progress made.

**The Worker members**, recalling that Malaysia had ratified the Convention in November 1957, observed that there had been a sharp increase in human trafficking for forced labour in the country. Linked as it was to globalization, it was a phenomenon that was to be found in many countries. In 2007, Malaysia had adopted the Anti-Trafficking in Persons Act that provided for penal sanctions of up to 20 years in prison. However, no information was available on any specific sanctions that might have been imposed under the Act. The overwhelming majority of persons trafficked in Malaysia were drawn from the 4 million foreign workers in the country, whether in a regular or irregular situation, most of them originating from South-East and South Asia. A great

many of them had been deceived about the type of work they would be expected to do, about their wages and about the treatment they would be subjected to, such as sexual exploitation, debt bondage or worse. The victims of forced labour were often treated as criminals when they were found in an irregular situation.

The Worker members considered that the Government was respecting neither the letter nor the spirit of the Convention, that the case under discussion should be followed up very closely by the Committee and that the Government should implement the Committee of Experts' recommendations without delay. They called on the Government to pursue its efforts to combat trafficking, notably as part of the National Action Plan on trafficking in persons and smuggling of migrants (2010–15), and to provide information on the steps taken and the results obtained. Recalling that under Article 25 of the Convention, States were required to apply effective penal sanctions strictly in cases of forced labour, they called on the Government to provide information on the specific sanctions that had been imposed on persons sentenced under the Anti-Trafficking in Persons Act. The Worker members indicated that in June 2009 the Indonesian Government had placed a moratorium on the placement of domestic workers in Malaysia in order to protect its nationals and that since then the two countries had signed a revised MOU on the employment of Indonesian domestic workers. Unlike the previous agreement, the MOU stipulated that Indonesian domestic workers were allowed to keep their passports while in Malaysia. They were also entitled to one day of rest per week and to be paid according to the going market rate. The Worker members noted, however, that the agreement did not appear at all to be respected. They urged the Government to take all necessary steps for the MOU to be applied both in law and in practice and invited it to request appropriate ILO technical assistance.

#### **Conclusions**

**The Committee took note of the oral and written information provided by the Government representative and the discussion that followed concerning trafficking in persons and the vulnerable situation of migrant workers with regard to the exaction of forced labour.**

**The Committee noted the information provided by the Government representative outlining the various measures taken to combat trafficking in persons and smuggling of migrants, including the implementation of the National Action Plan against trafficking in persons and smuggling of migrants (2010–15) which encompassed capacity building for law enforcement agents and awareness raising, as well as measures to provide victims of trafficking with shelters. It also noted the Government's information that, given the high number of migrant workers in certain sectors such as services, plantations, construction, manufacturing and domestic work, the Government had signed Memorandum of Understanding (MOUs) with 13 countries of origin to regulate the employment and recruitment of migrant workers, including a specific MOU on migrant domestic workers.**

**While noting the policies and programmes adopted by the Government to address trafficking in persons, as well as a number of cases filed under the Anti-Trafficking in Persons Act, the Committee noted the concern expressed by several speakers regarding the magnitude of this phenomenon. The Committee therefore urged the Government to reinforce its efforts to combat trafficking in persons. In this regard, it requested the Government to pursue its efforts to strengthen the capacity of the relevant public authorities, including the labour inspectorate, so as to enable them to identify victims and to deal effectively with the complaints received. In addition, it requested the Government to continue to take measures to provide victims of trafficking with adequate protection and compensation. Moreover, noting an absence of information in this regard, the Committee requested the Government to provide information on the specific penalties imposed on persons convicted under the Anti-Trafficking in Persons Act.**

**While noting the bilateral agreements signed between the Government of Malaysia and other countries to regulate the conditions of employment of migrant workers, the Committee noted with regret the absence of information from the Government on any additional measures taken to provide protection to the large number of migrant workers in the country. In this regard,**

the Committee noted the information provided by several speakers that workers who willingly entered Malaysia in search of economic opportunities subsequently encountered forced labour at the hands of employers or informal labour recruiters, through means of restrictions on movement, non-payment of wages, passport confiscation and the deprivation of liberty. The Committee recalled the importance of taking effective action to ensure that the system of employment of migrant workers did not place the workers concerned in a situation of increased vulnerability, particularly where they were subjected to abusive employer practices, which might cause their employment to be transformed into situations that could amount to forced labour. The Committee therefore urged the Government to take appropriate measures to ensure that, in practice, victims were not treated as offenders and were in a position to turn to the competent judicial authorities in order to obtain redress in cases of abuse and exploitation. Moreover, noting an absence of information on the number of prosecutions concerning the exploitative employment conditions of migrant workers, the Committee urged the Government to take immediate and effective measures to ensure that perpetrators were prosecuted and that sufficiently effective and dissuasive sanctions were imposed. The Committee encouraged the Government to continue to negotiate bilateral agreements with countries of origin, to ensure their full and effective implementation, so that migrant workers were protected from abusive practices and conditions that amounted to the exaction of forced labour once they were in the country, and to work with the countries of origin to take measures for their protection prior to departure.

The Committee requested the Government to accept a technical assistance mission to ensure the full and effective application of this fundamental Convention. It requested the Government to provide a detailed report to the Committee of Experts addressing all the issues raised by this Committee and the Committee of Experts for examination at its next meeting. The Committee expressed the hope that it would be able to note tangible progress in the application of the Convention in the very near future.

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